IN THE SUPREME COURT
STATE OF ARIZONA

STATE OF ARIZONA, Appellee, v. BRYAN PATRICK MILLER, Appellant.	No. CR-23-0157-AP Maricopa County Superior Court No. CR2015-102066-001 (CAPITAL CASE)

APPELLANT'S OPENING BRIEF

Aaron J. Moskowitz
Arizona State Bar Number: 022246
Deputy Maricopa County Public Defender
Downtown Justice Center
620 West Jackson Street, Suite 4015
Phoenix, Arizona 85003
Telephone: (602) 506-7711
Email: ACE@mail.maricopa.gov

Scott L. Boncoskey
Arizona Bar Number: 032748
Deputy Legal Defender
222 North Central Avenue, Suite 81-00
Phoenix, Arizona 85004
Telephone (602) 506-8800
Email: OLD_PCRME@maricopa.gov

Attorneys for Appellant Bryan Miller

ISSUES

1. Does the warrantless seizure and subsequent search of a presumptively innocent person's genetic information violate the state and federal constitutions?

2. Does capital punishment for a person who is under 21 at the time of the offenses violate the United States Constitution's Eighth Amendment?

3. Does the "was previously convicted" aggravating factor under A.R.S § 13-703(F)(2) (1992 & 1993) plainly or contextually contemplate simultaneous convictions for offenses consolidated for trial purposes with the homicide?

4. Do the consecutive sentences for Counts 5 and 6, the attempted sexual assault convictions, violate double punishment?

5. Does the trial court's failure to state its reason for its consecutive sentences on Counts 5 and 6, the attempted sexual assault convictions, warrant a remand for the trial court to state its reason?

6. Did the trial court impermissibly double count the same fact in weighing the aggravation under A.R.S § 13-703(F)(1) and (F)(2) (1992 & 1993)?

7. To the extent that the 1993 kidnapping and attempted sexual assault were not factually predicated on the fatal stabbing, was it an error to designate these offenses as dangerous, which rendered them violent offenses for purposes of aggravating the 1992 homicide under A.R.S. § 13-703 (F)(2) (1992)?

8. On independent review, should this Court spare Bryan Miller's life?

9. Issues Preserved for Federal Review.

TABLE OF CONTENTS

Page

Issues.....2

Statement 16

A. Bryan's Childhood.....16

B. Adolescence 18

C. Emerging Adulthood.....24

D. Angela Brosso's Death 26

E. MB's Death 27

F. Marriage, Parenthood, and Move to Washington.....29

G. Return to Phoenix and Subsequent Divorce 31

H. Single Dad, Seraphina, and New Community 32

I. Dinner, Arrest, and Search Warrant 34

J. Pretrial Proceedings.....36

K. Guilt Phase 38

L. Penalty Phase.....40

M. Special Verdict and Sentences 40

N. Post-Judgment Proceedings 45

Argument 1 46
The warrantless seizure and subsequent search of a presumptively innocent person's genetic information violate the state and federal constitutions.

Standard of Review 46

Additional Facts 46

Discussion 50

A. The Fourth Amendment protects against the warrantless search and seizure of Miller's genetic information. 51

1. The Fourth Amendment protects genetic information as a matter of common law trespass. 51

a. A person's genetic information constitutes a person's Fourth Amendment "person." 52

b. A person's genetic information constitutes a person's Fourth Amendment "papers." 52

2. The Fourth Amendment protects genetic information as a matter of the reasonable expectation of privacy. 53

B. The Arizona Constitution's Private Affairs Clause protects a presumptively innocent person's privacy in their genetic information. 54

1. The Private Affairs Clause protects information that is personal, nonpublic, and unique. 55

2. A person's genetic information is personal, nonpublic, and unique. 56

3. The right to privacy in genetic information is reasonable. 56

C. The doctrine of abandonment should not apply to genetic information. 59

1. "Abandoning" genetic information is not analogous to traditional forms of abandonment. 59

2. The nature of genetic information should preclude application of the abandonment doctrine. 61

D. The doctrine of abandonment, even if applicable for Fourth Amendment purposes, should not apply here because it is inconsistent with the Private Affairs Clause. 63

E. Even assuming abandonment could apply, the "abandonment" here was not voluntary. 66

F. The remedy for the disturbance of private affairs and the warrantless Fourth Amendment search here should be exclusion, and the trial court's error in failing to grant exclusion was not harmless. 68

Argument 2 70

The execution of people who committed their crimes when they were under the age of 21 violates the Eighth Amendment's Cruel and Unusual Punishments Clause of the United States Constitution.

Standard of Review 70

Additional Facts 70

Discussion 72

A. The logic and resoning of *Roper* and *Graham* dictate that a person who comitted a capital offense while under the age of 21 should be categorically ineligible for the death penalty. 72

1. There is a national consensus against the execution of 18-to-21-year-olds, as indicated by the rarity of the practice. 75

2. The execution of 18-to-21-year-olds is a disproportionate punishment. 78

B. This Court can build upon *Roper*, and the trial court's failure to do so here was not harmless error. 80

Argument 3 83

The "was previously convicted" aggravating factor under A.R.S § 13-703(F)(2) (1992 & 1993) does not contemplate simultaneous convictions for offenses consolidated for trial purposes with a homicide.

Standard of Review 83

Additional Facts 83

Discussion 84

A. The text of § 13-703(F)(2) (1992 & 1993) plainly applies only to convictions that occurred in a separate case before the convictions in the present case, as this Court recognized in *State v. Hidalgo*. 85

B. Context confirms that § 13-703(F)(2) applies only to convictions that occurred before the convictions in the case for which the defendant is being sentenced. 88

C. Past cases incorrectly relied on the general purpose of aggravation rather than the text of (F)(2). They should be reconsidered. 91

D. Secondary interpretation principles support construing § 13-703(F)(2) as applying only to convictions that occurred before the convictions for which the defendant is being sentenced. 94

1. Purpose supports Bryan's interpretation of (F)(2). 94

2. Legislative history supports Bryan's interpretation of (F)(2). 98

E. The sentencing error was fundamental and prejudicial, and Bryan is entitled to resentencing. At a minimum, this Court should not consider the (F)(2) aggravating factor in its independent review. 101

Argument 4 106

The consecutive sentences for Count 5 and 6, the attempted sexual assault convictions, violate double punishment.

Standard of Review 106

Additional Facts 106

Discussion 106

Argument 5 113

The trial court's failure to state its reason for its consecutive sentences on Counts 5 and 6, the attempted sexual assault convictions, warrants a remand for the trial court to state its reason.

Standard of Review 113

Additional Facts 113

Discussion 113

Argument 6 115

The trial court impermissibly double-counted the same facts in weighing the aggravation under A.R.S § 13-703(F)(1) and (F)(2) (1992 & 1993).

Standard of Review 115

Discussion 115

Argument 7 123

To the extent that Count 4, the 1993 kidnapping, and Count 6, the 1993 attempted sexual assault, were not factually predicated on the fatal stabbing, it was error to designate the convictions for these offenses as dangerous, rendering Counts 4 and 6 violent offenses for purposes of aggravating Count 1 under A.R.S. § 13-703 (F)(2) (1992).

Standard of Review 123

Additional Facts 123

Discussion 123

Argument 8 127

This Court should spare Bryan's life under an independent review of the death sentences.

Standard of Review 127

Discussion 127

A. The (F)(1) and (F)(2) aggravating factors should not be double weighed. 128

B. The (F)(6) aggravating factor should not be given great weight. 129

C. The (G)(5) age mitigator should be weighty, and the Court should also find that Bryan's moral culpability was low. 130

D. The (G)(1) mitigating factor should have been found, and it should be given great weight. 132

E. This Court should find that Bryan has autism. 133

F. Mental health issues, including sexual sadism disorder, should be entitled to more than little weight. 136

G. Lack of future dangerousness should be weighty. 137

H. The abuse Bryan suffered at the hand of his mother should be entitled to substantial weight. 138

I. Bryan's life post-offense should be entitled to substantial weight. .....

Argument 9 143
Issues Preserved for Federal Review

Conclusion.....146

TABLE OF CITATIONS

Page

Cases

Allen v. Woodford, 395 F.3d 979 (9th Cir. 2005) 116
Arizona ex rel. Brnovich v. Maricopa Cnty. Cmty. Coll. Dist. Bd., 243 Ariz. 539 (2018) 85
Baze v. Rees, 553 U.S. 35 (2008) 148
Birchfield v. North Dakota, 579 U.S. 438 (2016) 52, 56
Brown v. Sanders, 546 U.S. 212 (2006) 102, 116
Burns v. Arizona Pub. Serv. Co., 254 Ariz. 24 (2022) 89
California v. Greenwood, 486 U.S. 35 (1988) 50, 60, 62
Carpenter v. United States, 585 U.S. 296 (2018) 61, 62
Champlin v. Sargeant, 192 Ariz. 371 (1998) 90
Comm. for Pres. of Established Neighborhoods v. Riffel, 213 Ariz. 247 (App. 2006) 89
Commonwealth v. Watt, 146 N.E.3d 414 (Mass. 2020) 79
Florida v. Jardines, 569 U.S. 1 (2013) 51
Graham v. Florida, 560 U.S. 48 (2010) 72, 74, 76, 81
Gregg v. Georgia, 428 U.S. 153 (1976) 95, 115, 146
Hidalgo v. Arizona, 583 U.S. 1196 (2018) 102
Huggins v. Superior Court (Patton), 163 Ariz. 348 (1990) 58
In re Monschke & Bartholomew, 482 P.3d 276 (Wash. 2021) 79
In re Riggins, 257 Ariz. 1 (2024) 92
Katz v. United States, 389 U.S. 347 (1967) 51
Kennedy v. Louisiana, 554 U.S. 407 (2008) 74, 81
Kyllo v. United States, 533 U.S. 27 (2001) 57
Lowenfield v. Phelps, 484 U.S. 231 (1988) 95
Lynch v. Arizona, 578 U.S. 613 (2016) 127
Lynn v. Reinstein, 205 Ariz. 186 (2003) 148
Malloy v. Hogan, 378 U.S. 1 (1964) 66
Mario W. v. Kaipio, 230 Ariz. 122 (2012) 56
Marston's, Inc. v. Strand, 114 Ariz. 260 (1977) 58
Maryland v. King, 569 U.S. 435 (2013) 52
Miller v. Alabama, 567 U.S. 460 (2012) 131, 144
Morgan v. Dickerson, 253 Ariz. 207 (2022) 58
Nicaise v. Sundaram, 245 Ariz. 566 (2019) 88, 90
North Carolina v. Pearce, , 395 U.S. 711 (1969) 97
People v. Pirillo, 78 A.D.3d 1424 (N.Y. App. 2010) 59

Ramos v. Louisiana, 590 U.S. 83 (2020) 81
Rasmussen by Mitchell v. Fleming, 154 Ariz. 207 (1987) 58, 64
Roper v. Simmons, 543 U.S. 551 (2005) ..... Passim
Skinner v. Railway Labor Executives' Assoc., 489 U.S. 602 (1989) 52
Smith v. Maryland, 442 U.S. 735 (1979) 62
State ex rel. Ariz. Dep't of Revenue v. Capitol Castings, Inc., 207 Ariz. 445 (2004) 99
State ex rel. Arizona Dep't of Revenue v. Tunkey, 254 Ariz. 432 (2023) 93
State ex rel. Thomas v. Foreman, 211 Ariz. 153 (App. 2005) 148
State v. Adair, 241 Ariz. 58 (2016) 81
State v. Agueda, 253 Ariz. 388 (2022) 93
State v. Alvarez, 205 Ariz. 110 (App. 2003) 115
State v. Armstrong, 218 Ariz. 451 (2008) 136
State v. Athan, 158 P.3d 27 (Wash. 2007) 56, 61
State v. Ault, 150 Ariz. 459 (1986) 68
State v. Beaty, 158 Ariz. 232 (1988) 146
State v. Bible, 175 Ariz. 549 (1993) 104, 121, 124
State v. Bocharski, 218 Ariz. 476 (2008) 127, 142, 148
State v. Boland, 800 P.2d 1112 (Wash. 1990) 65
State v. Brearcliffe, 254 Ariz. 579 (2023) 85
S*tate v. Burbey*, 243 Ariz. 145 (2017) 85, 92
State v. Burns, 988 N.W.2d 352 (Iowa 2023) 50, 52, 58 61, 63
State v. Carlson, 202 Ariz. 570 (2002) 117
State v. Cota, 229 Ariz. 136 (2012) 147
State v. Dann, 220 Ariz. 351 (2009) 102, 147
State v. Dixon, 226 Ariz. 545 (2011) 83, 115, 123
State v. Escalante, 245 Ariz. 135 (2018) 101, 120
State v. Ewer, 254 Ariz. 326 (2023) 88
State v. Forde, 233 Ariz. 543 (2014) 82, 106, 112
State v. Gallegos, 178 Ariz. 1 (1994) 110
State v. Glassel, 211 Ariz. 33 (2005) 148
State v. Gordon, 161 Ariz. 308 (1989) 107, 108, 111, 112
State v. Greene, 192 Ariz. 431 (1998) 127, 143
State v. Gretzler, 135 Ariz. 42 (1983) 91, 92, 96
State v. Gulbrandson, 184 Ariz. 46 (1995) 147, 148
State v. Hampton, 213 Ariz. 167 (2006) 147
State v. Henry, 176 Ariz. 569 (1993) 124
State v. Hidalgo, 241 Ariz. 543 (2017) ..... Passim
State v. Jean, 243 Ariz. 331 (2018) 57
State v. Jimenez, 165 Ariz. 444 (1990) 129, 130

State v. Larin, 233 Ariz. 202 (App. 2013) 109, 118
State v. Luviano, 255 Ariz. 225 (2023).....83, 93, 94
State v. Lynch, 238 Ariz. 84 (2015) 127
State v. McFall, 103 Ariz. 234 (1968) 67
State v. McGill, 213 Ariz. 147 (2006).....148
State v. McKinney, 185 Ariz. 567 (1996) 91, 92
State v. McKinney, 245 Ariz. 225 (2018) 129
State v. Medina, 193 Ariz. 504 (1999).....111
State v. Mitcham, __ Ariz. __, 559 P.3d 1099 (2024) ..... Passim
State v. Mixton, 250 Ariz. 282 (2021)..... Passim
State v. Montoya, __ Ariz.__, 554 P.3d 473 (2024) 70
State v. Nordstrom, 230 Ariz. 110 (2012).....99
State v. Pandeli, 200 Ariz. 365 (2001) 146, 147
State v. Pandeli, 215 Ariz. 514 (2007) 136
State v. Paxton, 186 Ariz. 580 (App. 1996).....68
State v. Payne, 223 Ariz. 555 (App. 2009).....99
State v. Perez-Gutierrez, 257 Ariz. 307 (2024).....113, 114
State v. Poyson, 198 Ariz. 70 (2000) 143, 147
State v. Poyson, 250 Ariz. 48 (2020) 129
State v. Prince, 226 Ariz. 516 (2011) 132, 136, 138
State v. Ring, 200 Ariz. 267 (2001) 147
State v. Roque, 213 Ariz. 193 (2006).....127, 147
State v. Rose, 548 A.2d 1058 (N.J. 1988).....116
State v. Roseberry, 210 Ariz. 360 (2005) 127
State v. Ross, 180 Ariz. 598 (1994) 146
State v. Rutledge, 206 Ariz. 172 (2003).....95, 99
State v. Salazar, 173 Ariz. 399 (1992).....146, 147
State v. Schackart, 190 Ariz. 238 (1997).....124
State v. Schad, 163 Ariz. 411 (1989) 116
State v. Smith, 146 Ariz. 491 (1985).....129
State v. Spreitz, __ Ariz. __, 561 P.3d 393 (2025) 129
State v. Steelman, 126 Ariz. 19 (1980) 96
State v. Stokley, 182 Ariz. 505 (1995) 146
State v. Styers, 177 Ariz. 104 (1993) 122, 128
State v. Sullivan, 205 Ariz. 285 (App. 2003).....82
State v. Tapia, 159 Ariz. 284 (1988).....66
State v. Thues, 203 Ariz. 339 (App. 2002) 123
State v. Tittle, 147 Ariz. 339 (1985) 116
State v. Tucker, 205 Ariz. 157 (2003).....94
State v. Tucker, 215 Ariz. 298 (2007).....89, 105, 127

State v. Urquidez, 213 Ariz. 50 (App. 2006) 106
State v. Valencia, 124 Ariz. 139 (1979).....91, 96, 97
State v. Valencia, 132 Ariz. 248 (1982).....131
State v. Valles, 925 N.W.2d 404 (N.D. 2019).....60, 66
State v. Van Adams, 194 Ariz. 408 (1999).....148
State v. Velazquez, 216 Ariz. 300 (2007).....116, 119
State v. Vickers, 129 Ariz. 506 (1981).....129
State v. Villalobos, 225 Ariz. 74 (2010) 137, 145
State v. West, 226 Ariz. 559 (2011) 123
State v. Williams, 183 Ariz. 368 (1995).....91, 143
State v McCray, 218 Ariz. 252 (2008).....123, 124, 125
Stringer v. Black, 503 U.S. 222 (1992).....102, 103, 116, 120
Thompson v. Oklahoma, 487 U.S. 815 (1988).....80
Trop v. Dulles, 356 U.S. 86 (1958).....146
Union Pac. R. Co. v. Botsford, 141 U.S. 250 (1891).....52
United States v. Jones, 565 U.S. 400 (2012) 51
United States v. Lewis, 921 F.2d 1294 (D.C. Cir. 1990) 66
United States v. McCullah, 76 F.3d 1087 (10th Cir. 1996) 116, 120
United States v. Thomas, 864 F.2d 843 (D.C. Cir. 1989).....59
Williams v. New York, 337 U.S. 241 (1949).....97
Woodson v. North Carolina, 428 U.S. 280 (1976) 148
Zant v. Stephens, 462 U.S. 862 (1983) 95, 115

Constitutional Provisions

Ariz. Const. Art. 2, § 1 ..... 146, 148
Ariz. Const. Art. 2, § 4 ..... 146, 148
Ariz. Const. Art. 2, § 15 ..... 146, 147, 148
Ariz. Const. Art. 2, § 8 ..... 46, 50, 54, 55
Ariz. Const. Art. 6, § 5(3) 45
U.S. Const. Amend. 4 51
U.S. Const. Amend. 5 ..... 147, 148
U.S. Const. Amend. 6 ..... 147, 148
U.S. Const. Amend. 8 ..... 72, 146, 147, 148
U.S. Const. Amend. 14 ..... 147, 148

Statutes

A.R.S. § 13-105..... 110
A.R.S. § 13-116..... 106, 111

A.R.S. § 13-604..... 109, 118, 125
A.R.S. § 13-702..... 109
A.R.S. § 13-703..... Passim
A.R.S. § 13-704..... 44
A.R.S. § 13-711..... 113, 114
A.R.S. § 13-751..... 148
A.R.S. § 13-755..... 127
A.R.S. § 13-1001..... 110, 118, 124
A.R.S. § 13-1406..... 109
A.R.S. § 13-1802..... 53
A.R.S. § 13-4031..... 45
A.R.S. § 13-4033..... 45

Other Authorities

2003 Ariz. Sess. Laws ch. 255 (1st Reg. Sess.)..... 98, 100
American Psychological Association, *Resolution on the Imposition of Death as a Penalty for Persons Aged 18 Through 20, Also Known As the Late Adolescent Class* (Aug. 2020) 79
Black's Law Dictionary (2d. ed. 1901).....55
John H. Blume, et al., *Death by Numbers: Why Evolving Standards Compel Extending Roper's Categorical Ban against Executing Juveniles from Eighteen to Twenty-One*, 98 Tex. L. Rev. 921 (2020).....75, 76, 77, 78
Death Penalty Information Center, Defendants Sentenced to Death in 2018 77
Death Penalty Information Center, Defendants Sentenced to Death in 2019 77
Death Penalty Information Center, Defendants Sentenced to Death in 2020 77
Death Penalty Information Center, Defendants Sentenced to Death in 2021 78
Death Penalty Information Center, Defendants Sentenced to Death in 2022 78
Death Penalty Information Center, Defendants Sentenced to Death in 2023 78
Death Penalty Information Center, Defendants Sentenced to Death in 2024 78
Death Penalty Information Center, Execution Database 76
Death Penalty Information Center, *State by State* 75
Allison Durkin, *Estimating A Face: What Predicting Appearance from DNA Reveals About the Need to Regulate Genetic Investigations*, 101 Wash. U.L. Rev. 1241 (2024).....63, 65
Brian Eschels, *Data & the Death Penalty: Exploring the Question of National Consensus Against Executing Emerging Adults in Conversation with Andrew Michaels's* A Decent Proposal: Exempting Eighteen- to Twenty-Year-Olds from the Death Pe, 40 Harbinger 147 (2016).....75, 76, 78

Yaniv Heled & Liza Vertinsky, *Genetic Paparazzi: Beyond Genetic Privacy*, 82 Ohio St. L.J. 409 (2021).....61
House Fact Sheet for S.B. 1267, 46th Leg., First Reg. Sess. (May 15, 2003) 99
Elizabeth E. Joh, *Reclaiming "Abandoned" DNA: The Fourth Amendment and Genetic Privacy*, 100 Nw. U. L. Rev. 857 (2006) 60, 61, 62
Merriam-Webster Online Dictionary.....86, 110
State v. Mitcham, CR-23-0235-PR, *Brief of Amici Curiae American Civil Liberties Union and American Civil Liberties Union of Arizona in Support of Appellee*, 2024 WL 3548563 (June 11, 2024) 58
State v. Mitcham, CR-23-0235-PR, Rec. Oral Arg. at 16:25-41 51
New Websterian Dictionary (1912).....55, 86
Martina Nilsson, et al., *Evaluation of Different Cleaning Strategies for Removal of Contaminating DNA Molecules*, 13 Genes 162 (2022) 63
Note, *The Right to Privacy in Nineteenth Century America*, 94 Harv. L. Rev. 1892 (1981) 58, 64
Timothy Sandefur, *The Arizona "Private Affairs Clause*, 51 Ariz. St. L.J. 723 (2019) 57
Daniel J. Sharfstein, *The Secret History of Race in the United States*, 112 Yale L.J. 1473 (2003) 65
Francis X. Shen, et. al., *Justice for Emerging Adults After* Jones*: The Rapidly Developing Use of Neuroscience to Extend Eighth Amendment Miller Protections to Defendants Ages 18 and Older*, 97 NYU L. Rev. Online 101 (2022) 79

STATEMENT

A. Bryan's Childhood

On October 24, 1972, Ellen and Army member Paul Miller gave birth to Bryan. [Reporter's Transcript ("RT") 2/27/23, 18]. When she became pregnant, which was unplanned and resulted in the couple's marriage months later, Ellen was reluctant to tell her parents and never went for prenatal care. [RT 05/15/23, 37–38; RT 11/9/2022, 10]. Shortly after the birth, the family moved to Hawaii where Paul was stationed. [RT 11/9/2022, 10–11].

Five years later, on December 15, 1977, United States military officers came to the family's door: Paul Miller had died in a motorcycle accident. [RT 3/6/23, 52; RT 4/18/23, 38].

When Ellen brought Bryan to the funeral in West Virginia, Ellen paid "not one bit of attention" to Bryan. [RT 04/18/23, 41 (Aunt Donna adding Ellen "never paid attention to him"); *see also id*. at 39 (recounting how Bryan "went up to the casket and wanted to know what was in there. So one of the family members lifted him and he hollered out, that's my daddy.")].

Later that year, when five-year-old Bryan discovered and opened the Christmas present his recently departed father had left for him, a set of wooden blocks, Ellen got rid of them. [RT 12/14/22, 23–24]. The incident foreshadowed the abuse Bryan would suffer over the next ten years of his life. [RT 3/16/23, 61–62

(Dana-Kirby agreeing Bryan was "frequently" abused from ages 5 through 15)]. And while Bryan also suffered from bullying in school during this period of his life, [RT 5/15/23, 44–45], what happened at home, at the hands of his mother, was far worse.

Sometimes, Ellen would hit Bryan on the head. [RT 11/10/22, 20]. Sometimes, she would hit him in the face—after all, she "didn't like the way he looked." [RT 3/7/23, 110]. Their neighbor in Hawaii, "Pinky," consistently saw Ellen hit Bryan. [*Id.* at 109]. A missionary in Hawaii also saw it. [*Id.*]. So did Bryan's Aunt Barb. [*See* R.T. 11/9/22, 31–32 (hearing smack, seeing Bryan hold his face, and hearing Ellen admit to having hit him); *id.* at 38 (observing Ellen throw a hammer across the room at Bryan, which missed him)].

Unlike spankings or even "lickings," neighbors could hear the "crack" of the strap and Bryan's screams from outside the Miller home. [RT 11/10/22, 20 ("There's no mistake in—there's no mistake in belt to ass. There's no mistake in that sound."); *id.* at 40 (distinguishing "lickings" from "beatings"); *id.* at 63–64 (recounting hearing "whoopings" and "screams" and that there was "no speculating" about it)].

In 1980 or 1981—when Bryan was in second grade—his special-education teacher noticed that his body bore marks of abuse. [RT 1/19/23, 137 (hanger marks on back and burns on arms)]. Around the same time, Bryan ran away from home twice. [RT 2/7/23, 10–11].

Ellen's abuse was not just physical, but also emotional and psychological. She would sometimes treat Bryan like a dog, making him eat his food out of a dog bowl. [RT 11/14/22, 54–55 (Loring recounting observations by neighbors in Hawaii); RT 2/09/23, 65–66]. In a similar vein, when Bryan fell off his bicycle and spilled the pizza he was bringing home one day, Ellen made him eat it—dirt and gravel and all. [RT 3/16/23, 33–34 (Dana-Kirby describing this as "sadistic" psychological and physical abuse)].

Ellen also told her son that she wished that he had been the one to have died, not his father Paul. [RT 11/14/22, 47]. She told him, "I wish I had an abortion and never had you." [*Id.*] And she would buy toys and candy only to withhold them from Bryan. [RT 11/9/22, 36–38 (Ellen ate candy in front of Bryan and "would buy very expensive toys for Bryan, and … would put them up out of reach where he couldn't get to them, and he wasn't allowed to play with them")]. Bryan was "clearly abused as a child." [RT 3/7/23, 67].

B. Adolescence

In June of 1983, Ellen put a 10-year-old Bryan on an airplane without telling him that was moving to Arizona permanently. [RT 12/14/22, 209; RT 5/2/23, 74–75]. Two of the plane's engines failed, and the plane made an emergency "foam"

landing. [RT 12/14/22, 209]. When the authorities called Ellen, they learned that Bryan would rather stay at the airport, where he felt safer, than return home. [*Id.*]

In Arizona with his Aunt Barb, Ellen's younger sister, Bryan found himself "pleasantly" surprised (if not "kind of confused") that when he did something wrong, his Aunt Barb talked with him about it instead of having "his ass beat." [RT 5/15/23, 44–45; RT 11/9/22, 25–26 (Aunt Barb describing how when Bryan first came to Phoenix he would flinch at a mere hand movement)].

But Ellen soon moved from Hawaii to Arizona and took Bryan. [RT 11/9/22, 28, 42].

The change in scenery didn't improve her behavior, though; instead, it "escalated." [*Id.* at 31; *see also id*. at 39 (describing Ellen's "quick temper" that was "quite frightening"); RT 12/14/22, 61 (recounting report that Ellen grabbed Bryan's hair and smashed his head against a wall or floor in the 1987 to 1989 timeframe)].

And her emotional and psychological abuse took a sexual turn—just as Bryan was entering adolescence. During a fit of anger driving one day, "[Ellen] told [Bryan] that she was going to put him somewhere where he would be butt-fucked." [RT 11/09/22, 40 (Aunt Barb adding this was consistent with other language Ellen used)]. She accused Bryan, when he was around 13 years old, of taking cookies to

exchange for sex. [*Id.* at 167]. Before entering a bathroom, "[s]he would say, be careful, there are men in there who would rape a child like you." [RT 12/14/22, 61].

Ellen also regularly exposed Bryan to pornography. [RT 11/9/22, 58; RT 11/14/22, 126]. She left nude pictures of herself out around the house. [RT 11/14/22, 128]. She changed her clothing and masturbated in front of him. [*Id*. at 127]. She threatened to show girls pictures of him as a baby to prove he had a small penis. [*Id*. at 127–28]. And she twice threatened to cut off Bryan's penis with a knife when he was 15 years old. [RT 10/27/22, 60; RT 2/27/23, 115].

Bryan's behavior—which by all accounts had only been marked by shyness, awkwardness, and immaturity—unsurprisingly also escalated during this period. [*See* RT 11/21/22, 30 ("He also has been described by people he's interacted with as shy, awkward, insecure, and emotionally immature for his age at the time, whatever that age was."); RT 11/14/22, 82–83 (explaining Bryan's escalating behavior as a reaction to abuse)].

In 1984, an 11-year-old Bryan lit a school desk on fire, which he informed the school about. [RT 2/27/23, 36]. In 1985, a 13-year-old Bryan was arrested for shoplifting a toy from Smitty's. [*Id.* at 36]. In 1987, a 14-year-old Bryan was cited for a curfew violation. [*Id.* at 36–37].

Around 1988, Bryan was eventually referred to an outpatient program for troubled youth called Arizona Youth for Change ("AYC"), which was affiliated with

Saint Luke's Hospital. [*See* R.T. 3/2/23, 10–11, 73]. The program offered Bryan and Ellen several interventions, including family counseling. [*Id.* at 18]. But according to their counselor Cynthia Elliot, Ellen was not "a willing, eager participant in having a better relationship with Bryan." [*Id.* at 82].

Instead, Ellen seemed "inconvenienced by the whole thing." [*Id.*] She never advocated for Bryan in any way, never asked how to make things better, and would sigh loudly. [*Id.*; RT. 05/15/23, 107]. Her language was also "so vulgar" that it made Elliot, who "was used to listening to adolescents whose language was not always appropriate," "blush." [RT 3/2/23, 20, 81].

There was one session, however, where Ellen did engage—the "one family therapy session that stayed with [Elliot]." [*Id.* at 18]. In it, Ellen was "particularly angry" with Bryan because he had used a "sharp instrument" to slash a vagina into each of the Barbie dolls in Ellen's collection. [*Id.* at 18–19 ("I remember at the time thinking" that "I don't know how to respond to that")].

Ultimately, Elliot remembers that Bryan and Ellen did not have "a warm, caring relationship at all." [*Id.* at 21]. She recalled that Bryan preferred isolation and had limited communication skills. [*Id.* at 76–79]. By this point in his life, Bryan was "definitely more disturbed" than the other kids in the program. [*Id.* at 73].

In June of 1988, while at AYC, a 15-year-old Bryan yanked a chalkboard off the wall, resulting in criminal damage charges. [RT 3/8/23, 51–52; RT 2/27/23, 38].

Notably, that same month, the Maricopa County Sheriff's Office denied Ellen a promotion because her psychological testing revealed that she lacked empathy—and was too violent. [RT 11/16/22, 126–28; *see also* Trial Exhibit ("Ex.") 106, 175; RT 1/23/23, 108 (Ellen's employment eventually terminated); RT 5/15/23, 59].

By January 1989, Bryan entered the Adobe Mountain School, a juvenile correctional facility. [RT 5/15/23, 102]. "[W]hen he was original[ly] sent there, he was frightened, scared, intimidated. It was a population he was wholly unfamiliar with in terms of aggression, in terms of gang involvements." [*Id.*]. Perhaps unsurprisingly, Bryan was bullied there too. [RT 11/3/22, 54].

Adobe was indeed plagued with violence, overcrowding, and mismanagement during this time—issues that ultimately resulted in a federal consent decree. [RT 5/15/23, 108–15]. Staff was not aware of the difference between adult criminals and juvenile offenders. [*Id*. at 111]. There was no educational programming, staff was reactive and aggressive in discipline, and they could be inappropriate. [*Id.* at 15; *see also id.* at 124 ("nothing there" promoted rehabilitation); *id.* at 121–22 (recounting how a female guard learned Bryan liked red hair and then showed up for work the next day with her hair colored accordingly)]. It had "no structure" and was "really chaotic." [*Id.* at 125–26].

Three months later, on March 30, 1989, Bryan was released, but not for long. [*Id.* at 102]. On May 17, 1989, 16-year-old Bryan rode a bus to what was then the

Paradise Valley Mall, saw 24-year-old Celeste Bentley—who some, including Bryan, remarked looked like Ellen—and stabbed her in the back. [RT 10/11/22, 87–103; RT 11/2/22, 6–16; R.T. 11/9/22, 137; RT 2/9/23, 17].

When the police found him, Bryan drew a map of where the knife would be. [RT 11/2/22, 19; *id.* at 34 (describing Bryan as cooperative)]. Asked during his interrogation whether he did it to excite him sexually, Bryan denied it. [*Id.* at 33]. When the officer asked if he did it to see what it felt like, Bryan responded something like, "Yes, I guess." [*Id.* at 33]. To Bryan, the incident felt like someone was controlling his arm, like a video game controller. [RT 11/14/22, 99]. The arresting officer notably urged that Ellen seek counseling for Bryan. [*Id.* at 105]. It apparently never occurred.

Bryan returned to Adobe and, despite being under the custody of the State, was attacked "on a number of occasions." [RT 5/15/23, 104–05 (punched in the face, jumped in his cell and pinned, buttocks grabbed during lunch, told he would be made a "bitch," and jumped and punched by multiple people)]. As Bryan approached his release date, Ellen gave a document to officials at Adobe, allegedly written by Bryan at an unknown date, in the hope that it would keep him from being released. [RT 3/13/23, 149–50].

The document, titled the "Plan," described a fictitious young woman and her belongings, the equipment the writer would have, and an enumeration of the steps

the writer would be taking, starting with a kidnapping that would lead to cutting and sexually assaulting the victim and culminating in her killing and dismemberment. [*Id.* at 150–51; Ex. 414; *see also* RT 3/8/23, 164 (Ellen also turned the document over to police)].

Despite the conditions at Adobe, a bright spot did emerge during Bryan's second stint—connecting with a Mennonite pastor named Menno Yoder. [RT 12/8/22, 7–8]. Menno was developing a program, called "Aim Right," for youth who would be released from Adobe, which would provide community support and an apartment. [*Id.* at 10–11].

C. Emerging Adulthood

When Bryan was eventually released from Adobe in July of 1990, and Ellen refused to let him return to her home, he entered an early version of the Aim Right program, first staying with church members before transitioning to an apartment. [*Id*. at 11; RT 5/15/23, 104].

There, Bryan appeared to thrive: although still quiet and socially awkward, he connected with Jerald Schrock—someone who actually "tried to understand Bryan more than anyone else could." (RT 12/8/22, 15, 29; *see also* RT 12/15/22, 25 (describing them as "very close")]. He was taught basic life skills—household cleaning, personal hygiene, organization, dressing presentably, and budgeting—

which were "very low." [RT 12/8/22, 17–23]. And with the program's help, Bryan landed a job and advanced from part-time to full-time. [*Id.* at 18].

Bryan also started attending the church regularly, was baptized, and participated in the community's activities. [*Id.* at 14, 35]. But, according to Menno, Bryan still "kept his emotions—really kind of hid his emotions basically" and "just didn't want to talk about [the pain and hurt from his past]." [*Id.* at 28, 41].

Although things seemed to be looking up for Bryan in early adulthood, he soon found himself confronted with new hurt and significant stressors in 1992 and 1993. [RT 12/15/22, 24–25]. After learning Bryan's apartment had become unruly, church members entered it, trashed a dumpster's worth of material, and cleaned without Bryan's knowledge while he was on a trip to Wilcox. [*Id.*; RT 12/15/22, 19–23]. When Bryan returned to see his things thrown away, he looked "hurt." [RT 12/15/22, 19–23; RT 11/17/22, 79–80 (observing that Bryan appeared to have "felt invaded" and that he "felt sorry for him" because "[i]t was his stuff [,] [w]hether it looked like garbage or not")].

Later in 1992, Bryan's bike and car were stolen. [RT 12/15/22, 24–26]. And a week after losing his bike, in October of 1992, Jerald, who had become an older brother figure to Bryan, moved away. [*Id.*; RT 11/17/22, 102, 105]. Months later, in May of 1993, Menno, Bryan's "father figure," also moved away. [RT 12/15/22, 25–

26; RT 12/8/22, 36]. Bryan moved to a new apartment with Randy McGlade, whom he had met at work. [RT 10/27/22, 17, 38-40].

D. Angela Brosso's Death

On the night of November 8, 1992, two weeks past Bryan's 20th birthday, Angela Brosso went on her usual mountain-bike ride along Phoenix's Arizona Canal. [RT 10/4/22, 15, 22]. At some point that evening—how is still unknown—she was stabbed in the back with a knife or other sharp instrument, which pierced four inches deep through her lung into her aorta. [RT 10/04/22, 123–24; *see also id.* at 166 (testifying that the stab wound to the back was the only identifiable antemortem wound)].

Angela likely lost consciousness "within 30 seconds." [RT 10/11/22, 35–36 (adding it "could have been less time")]. And "[g]iven [the estimated] rate of blood loss," Angela would have died "somewhere in the range between one and two minutes." [*Id.*; *see also* RT 10/4/22, 135, 167, 190 (noting no minutes or seconds given in autopsy report but estimating that, "at most," her death would have occurred "in minutes" because the back injury was "rapidly fatal")].

Angela's body was dragged approximately 165 feet away from the canal's bike path into a field. [RT 10/3/22, 104, 116]. Her body had also sustained several postmortem injuries. [*See* R.T. 10/04/22, 148–60, 182 (discussing severed head, incomplete severing of torso, and various cuts all over body but noting no

identifiable defensive wounds)]. And her clothing was left near her body. [RT 10/3/22, 104, 116]. Sperm was located on vaginal swabs. [RT 10/31/22, 40–42].

Police located Angela's head in the canal on November 20, 1992, just west of the I-17 and south of Metro Center, roughly a mile and a half from Angela's body, which was just east of the I-17 and south of Castles N' Coasters. [RT 10/3/22, 102, 137–38; *id.* at 18–19]. Despite the investigation, Angela's case eventually went cold. [*See* RT 10/10/22, 71].

E. MB's Death

Ten months later, on the evening of September 21, 1993, a month before Bryan's 21st birthday, a 17-year-old girl, MB, took a bike ride along the Arizona Canal. [*See* RT 10/5/22, 85, 90–96, 136–37]. According to Bryan's then-roommate Randy, Bryan also went on a bike ride that evening. [RT 10/27/22, 22–29, 59 (recalling nothing unusual about Bryan's clothing when he returned home, that Bryan said he was riding on the east side of town, that a kitchen knife went missing and returned before MB's death, that he had seen a turquoise body suit amongst Bryan's possessions at an unspecified time before MB's death, and that he had seen Bryan carrying a hunting knife in bag before and after MB's death)].

Like Angela, MB was stabbed in the back—how remains unknown—on the bike path just west of the I-17. [*Id.* at 68, 105–08; RT 10/11/22, 7–9; RT 10/10/22, 46 (testifying stab wound to back only identifiable antemortem wound)]. The injury

similarly penetrated through her back to her aorta, causing her to lose consciousness within 30 seconds and pass away between one and two minutes. [RT 10/11/22, 7, 35–36].

As with Angela, MB's body had been dragged away from the bike path, approximately 217 feet, toward a tree where pieces of her clothing had been left. [RT 10/5/22, 23–26, 130–31, 156; *see also id*. at 109 (additional clothing located in nearby dumpster)]. But, unlike Angela, MB was dragged back towards the path, and her body was left in the canal. [*Id*. at 105, 156]. Her body had similarly sustained several postmortem sharp-force injuries, but they were somewhat different from those of Angela's. [*See id*. at 44–46 (neck incision but no decapitation, several cuttings on chest); 120 (chest carvings appeared to depict a cross and the letters "W," "S," and "C," the significance of which the police were unable to determine)].

Unlike Angela, MB's body was also found in a turquoise-colored body suit, which MB apparently did not own. [*Id*. at 88, 118–19]. As with Angela, though, sperm was located on vaginal swabs from MB's body. [RT 10/10/22, 34–37]. Despite receiving a tip from a "Janie" that "Bryan Miller" had been seen with a body suit similar to the one found on MB, MB's case also eventually went cold. [*See* RT 10/5/22, 161; RT 10/10/23, 71].

F. Marriage, Parenthood, and Move to Washington

Bryan continued working at the St. Vincent de Paul thrift shop, the same job he obtained through the Aim Right program, for the next several years. [*See* RT 3/29/23, 35, 80]. There, he met his future wife, Amy. [*Id*. at 80].

On November 10, 1996, she accepted his offer to go on their first date. [*Id*. at 35–36]. They went to Castles N' Coasters for miniature golf and Olive Garden for dinner. [RT 3/8/23, 9, 231 (recalling that he was "really sweet")].

They continued dating, and Bryan eventually shared that he had a juvenile record, as well as some aspects of his abusive childhood. [RT 3/29/23, 35–37; RT 3/9/23, 51–52, 59–65, 135 (adding that Bryan discussed his abusive childhood with her only one or two times, he discussed affinity for biking when dating, and they used canal paths and tunnels under I-17 when biking)].

On New Year's Eve, underneath fireworks, Amy and Bryan finally kissed—each their first—and Bryan proposed. [*Id*. at 37, 43]. They married on August 10, 1997. [*Id*. at 44].

Nothing Amy did was good enough for Ellen, however, who by now had moved to Everett, Washington to live with her cousin, George. [*Id*. at 59–64]. But struggling financially as newlyweds, Amy and Bryan moved to Everett in 1998 to live with Ellen on Ellen's promise that Ellen could find Bryan a good-paying job at Boeing. [*Id*. at 58–59]. The experience wasn't pleasant. [*Id*. at 59–60].

There was no Boeing job, they had to sleep on the couch, and Ellen restricted their freedom in the home. [*Id*. at 59–61; *see also* RT 3/29/23, 48, 70 (Amy got a restaurant job and Bryan got a minimum wage job)]. Ellen would tell Bryan that Amy was "[a] whore, a cunt, an idiot." [RT 5/3/23, 60].

When Amy realized that she was pregnant, Bryan was supportive, stressed, and happy about expecting their first child. [RT 3/29/23, 67–68]. Amid the pregnancy, though, Ellen and George moved, told the couple they didn't want them to move in with them, and gave Bryan and Amy a couple weeks to find new housing. [*Id.* at 55–56)]. Fortunately, they were able to find government-subsidized housing just in time. [*Id*. at 56].

Unlike Ellen, Bryan attended "pretty much all" the doctor appointments. [*Id*. at 71]. He also attended the delivery; Ellen, however, had to be removed from the delivery room for "complaining that [Amy wasn't] having the baby fast enough." [RT 3/29/23, 65–67]. Their daughter, Sarah, was born in 1999. [*Id*.; RT 12/5/22, 9].

Amy stayed at home with Sarah for 18 months, but Bryan lost his job, and Amy had to return to work at McDonald's. [RT 3/9/23, 68–69]. Bryan remained a stay-at-home dad until he found work six months later; after that, the couple alternated working and staying home to care for Sarah. [*Id*. at 69, 74; *see also* RT 3/29/23, 81–82 (recounting Bryan's work history in Washington)]. They still managed to make time for church. [RT 3/9/23, 71].

In May of 2002, Bryan was arrested for allegedly stabbing a woman in the back. [*Id*. at 74]. Bryan maintained that he acted in self-defense, and he was acquitted of the offense after having served eight months in pretrial custody. [*Id*. at 75; RT 12/5/22, 82; RT 2/15/23, 23].

The ordeal, however, had a significant impact on Bryan and his relationship with Amy. [*See* RT 3/29/23, 97, 132 (noting Bryan reported mental-health problems in custody, and agreeing that his jail letters evinced a belief that "violence and intimacy were somehow linked together"); *id.* at 77–78, 93, 99, 105, 114 (describing change in sex life after his release from "normal" to involving bondage, using things to induce pain, and violent pornography); *id*. at 109 (Bryan started reacting by yelling or throwing things after release)].

G. Return to Phoenix and Subsequent Divorce

Seeking a fresh start after Bryan's acquittal at trial, and to care for Amy's sick grandmother, Bryan, Amy, and Sarah returned to Phoenix in 2003. [RT 3/9/23, 75, 123–24]. The family stayed with Amy's grandparents for about a year until her grandparents passed, and, during that time, Bryan took care of Sarah, drove Amy's grandparents to doctor appointments, and helped with grocery shopping for the family. [*Id.* at 124–26].

Eventually, sometime in 2005, Bryan learned that Amy had gone on a date with one of her co-workers at McDonald's. [RT 3/29/23, 75, 117, 120–21]. Although he was angry when he learned, he didn't become violent. [*Id.* at 122–23].

He filed for divorce in January of 2006, a painful decision, and the divorce was finalized by April of 2006. [*Id*. at 127–28 (noting Bryan cried after separation)]. Shortly before the divorce was finalized, Amy decided to leave Phoenix with her new partner, and a court awarded Bryan full custody of Sarah. [*Id*. at 130].

H. Single Dad, Seraphina, and New Community

As the divorce was being finalized, Bryan started dating Seraphina Nichol, whom he met when they were working at the Renaissance Fair. [RT 12/5/22, 7]. They dated on and off until 2011, around the same time Ellen passed away. [*Id*.; *see also* RT 11/09/22, 70 (Ellen passed December 2010)].

Seraphina recalls that Bryan told her about having a "pretty bad childhood" with his mother, who was "abusive," but he generally tried to "avoid really getting into it" because it was a "sensitive subject." [RT 12/5/22, 23, 55 (adding Bryan disclosed Ellen said she wished he was never born, would beat him, would have him wear long sleeves in the middle of the summer because he had so many bruises on his arms, and slammed his head against the wall)].

According to Seraphina, and in notable contrast to Ellen, "[Bryan] cared about [Sarah]. He would tell her he loved her, and he wanted to make sure she was safe

and taken care of." [RT 12/5/22, 34–36 (adding he was never violent, would talk with her when she got in trouble, and was honest with her); *see also id*. at 37–38 (Although he was limited in his emotional vulnerability with Sarah, "he loved her, obviously. All his friends could see that he loved her. She could see he loved her.")].

There was no violence in Bryan and Seraphina's relationship, nor was it a part of their sex life. [*Id*. at 43–47 (no pornography, bondage, knives, cutting)]. Bryan was, however, emotionally "stunted" and immature. [*Id*. at 28 (adding he was "never taught the correct way to handle emotions or express emotions without feeling like they were wrong"); *see also id*. at 49–51 (although he sometimes hit the wall when upset, he would usually "totally shut down" or cry)].

Bryan's house during this period was "crowded," filled with unopened boxes of his various collectibles and materials for DIY projects. [*Id*. at 39–41]. This "hoarding" reflected, in material terms, Bryan's lifelong interests in the fantasy genre, cars, and DIY projects. [*See* RT 3/2/23, 28–29 (describing Bryan's childhood interest in drawing, particularly fantasy subjects); RT 11/17/22, 81, 83–84 (describing Bryan's interest in cars and encyclopedic knowledge about them); RT 4/20/23, 41 (describing how Bryan attended the Renaissance Fair with Sarah and interacted "with the Renaissance [role] play"); RT 11/14/22, 48 (opining that Bryan's early interest in fantasy was a way to cope with abuse)].

Those interests eventually led to what became one of the most important communities in Bryan's life: the Arizona Steampunk Society. [*See* RT 5/3/23, 102–03 (describing Bryan as an introvert even within "the nerdy community"); *id*. at 19–20 (explaining that the group worked on roleplay costumes and attended various events like Comic-Con); RT 4/20/23, 29 (describing how Bryan was "fully involved" in the society, it took up a "good part" of his life, and "made him very happy"); *see also generally* Ex. 909 (explaining steampunk as a Victorian-themed fantasy genre in which steam powers society)].

As an outgrowth of his involvement in the steampunk society and its costume-crafting and roleplay, Bryan took on a new persona as a "zombie hunter." [RT 5/3/23, 27–31, 34–38; *see also* RT 2/28/23 PM, 67–68 (opining Bryan's roleplay was a "mechanism for interaction," which he struggled with)]. He worked hard on this character, which hunted zombies in a post-apocalyptic world, riding in an old police car. [RT 5/3/23, 29–30]. Bryan's modified car included flavorful graphics, features, and even a dummy zombie in the back seat. [*Id.*; RT 4/20/23, 55]. His character and car "became pretty well-known" around the Phoenix area. [*Id*. at 30].

I. Dinner, Arrest, and Search Warrant

In 2011, the police reopened the investigation into Angela and MB's deaths. [RT 10/10/22, 71]. In the course of the investigation, they contacted a forensic genealogist to run the Y-STR DNA profile obtained from the vaginal swabs from

Angela and MB's bodies through a private forensic genealogy database. [RT 12/11/20 AM, 85]. The genealogist told police that the profile belonged to a Caucasian male with the surname "Miller." [*Id*.].

Returning to the original case file and investigation, police noted the tip about the turquoise leotard that was allegedly seen with Bryan Miller, the "Plan" document that Ellen gave to police years before the offenses, and Bryan's juvenile adjudication for stabbing Celeste Bentley. [RT 10/10/22, 97–100]. The focus of the investigation shifted to Bryan. [*Id*. at 99].

After three days of surveillance failed to yield an opportunity to obtain Bryan's DNA, the police hatched a "ruse" to obtain it. [*Id*. at 72, 100]. Posing as security-guard employers, the police contacted Bryan on December 31, 2014, in the parking lot of his then-employer, an Amazon warehouse, to solicit his interest in working as a security guard. [*Id*. at 72–73]. Bryan said he was interested, and police told him that they would pay him for his time if hired and meet with him later to get an employment application filled out and discuss the job. [*Id*. at 73–74].

They arranged a meeting to occur at a Chili's restaurant for January 2, 2015, where the police, in coordination with restaurant staff, set up a table in advance of the meeting with preset, sanitized utensils, glassware, and plates, which officers then surveilled to ensure it was left undisturbed before Bryan arrived. [*Id*. at 75, 112–17]. Bryan arrived on the agreed date with Sarah, filled out a fake application,

participated in the purported interview, and dined with the officers. [*Id*. at 74]. After about an hour, the pretextual interview concluded, officers escorted Bryan to his car, and collected the glassware from the table, which they then set off for genetic testing. [*Id*. at 74, 119–21].

The testing resulted in a profile that matched the profile from that obtained from Angela and MB's bodies. [RT 10/31/22, 133–35, 137–42]. Officers also obtained a search warrant for Bryan's home where police located, among Bryan's voluminous collections of things, violent pornography. [RT 10/10/22, 121–25]. Bryan was arrested the same day, January 13, 2015. [RT 12/11/20 AM, 85].

During his "cordial" post-*Miranda* interrogation, Bryan denied killing Angela or MB over a dozen times. [RT 11/3/22, 36, 37–38, 45 (also stating he was afraid to go in bike tunnels around Metro Center area); RT 12/11/20 AM, 26–29; Ex. 588].

Approximately 84 minutes into the interrogation, after the sole interrogating officer left the room, Bryan said he wanted a lawyer. [RT 12/11/20 AM, 7–8]. Claiming they did not hear this, despite being tasked with monitoring what suspects say and do while alone in the interrogation room, police did not oblige. [*See id*. at 7–8, 10–11, 16].

J. Pretrial Proceedings

On January 22, 2026, Bryan was indicted on six counts, three as to each victim: First Degree Murder (Premeditated or, in the alternative, Felony Murder), a

class 1 dangerous felony (Count 1 as to Angela and Count 2 as to MB); Kidnapping, a class 2 dangerous felony (Count 3 as to Angela and Count 4 as to MB); and Attempted Sexual Assault (Count 5 as to Angela and Count 6 as to MB). [Electronic Index of Record ("EIR") 9].[1]

On May 29, 2015, the State filed its notice of intent to seek the death penalty and alleged three aggravating factors as to each homicide. [EIR 62]. For both Counts 1 and 2, the State alleged Bryan (1) had been convicted of another offense for which a life or death sentence was imposable under A.R.S. § 13-703(F)(1), to wit: the other charged homicide count; (2) was previously convicted of a dangerous or serious offense under § 13-703(F)(2), to wit: all the other charged counts; and (3) committed the offenses in an especially heinous, cruel or depraved manner under § 13-703(F)(6). [EIR 62].[2]

Before trial, among several other motions, Bryan moved under the Fourth Amendment and the Arizona Constitution to suppress his DNA profile, and all evidence stemming from it, that police obtained through the Chili's ruse. [EIR 451]. He also moved to dismiss the State's notice of intent to seek the death penalty,

[1] Count 6 was originally charged as a completed sexual assault, but the State amended the count before trial to attempted sexual assault. [EIR 604].

[2] The aggravation statute at the time of Bryan's offenses in 1992 and 1993 was A.R.S. § 13-703(F).

arguing that imposing a death sentence on someone under 21 years old at the time of the offense, as he was, would categorically violate the Eighth Amendment. [EIR 377]. The trial court denied both motions. [EIR 492, 7; EIR 402, 4].

Bryan ultimately elected to advance a not guilty by reason of insanity defense at trial. [EIR 516; *see also* RT 10/17/22, 3–7]. After being found competent to stand trial, he also waived his right to a jury trial. [RT 3/2/22, 4–15]. Although the court found the waiver voluntary, its colloquy omitted any inquiry into whether Bryan had been, directly or impliedly, promised anything in return for his waiver. [*See id.* (asking only whether he was "forced or threatened in any way to waive")].

K. Guilt Phase

In attempting to prove that Bryan committed the charged offenses, and that he was not insane and instead had antisocial personality and sexual sadism disorders, the State primarily relied on the DNA matches, Randy's observations from around the time of MB's death, the plan document, the postmortem injuries the victims suffered, the prior stabbing of Celest Bentley, the violent pornography Bryan possessed, his post-release sexual behavior with Amy, and the opinions of its experts. [*See* RT 4/5/23, 7–32; RT 4/6/23, 6–46].

After the State rested, Bryan moved for a judgment of acquittal, arguing the State failed to present substantial evidence (1) on each kidnapping count because stabbing cannot constitute restraint, (2) on each attempted sexual assault count

because no sex act occurred while the victims were alive, and (3) on each alternative felony murder count based on the failure to prove the predicate counts. [*See* RT 11/3/22, 92–100, 119–23]. The trial court, however, denied the motion, rejecting Bryan's restraint argument and finding evidence that the stabbing occurred with an intent to sexually assault a live victim sufficient to support the attempts. [EIR 763].

In defense, Bryan offered "two pathways" for insanity: (1) his autism spectrum disorder, trauma, and psychological disorders, coupled with his young age at the time of the offenses, resulted in a particular functional immaturity that prevented him from appreciating the wrongfulness of his conduct, and (2) his dissociative and other trauma-based disorders resulted in a trauma state, distinct and insulated from his normal state, in which violence and sex had become fused by virtue of his upbringing, preventing him from appreciating the wrongfulness of his conduct. [*See* RT 2/7/23, 69–72, 93–136 (adding that although the pathways were independently sufficient, they also "overlap some with each other, as each also synergistically contributes to the undermining [of] the moral awareness of the other"); *see also* RT 4/5/23, 36–136].

After approximately 53 days of trial, the court found Bryan guilty as charged without specifying whether Counts 1 and 2, for which the State dismissed the dangerousness allegation, were found under a premeditation theory or felony murder theory. [RT 4/11/23, 3–5, 12–13, 28].

L. Penalty Phase

Based solely on the verdict and evidence presented at trial, the State argued that it had proven the three alleged aggravating circumstances as to each offense. [*See* RT 4/11/23, 31; RT 4/12/23, 27–31]. The trial court partly agreed: it only found that the State had proven that the offenses were heinous and depraved, not cruel, under § 13-703(F)(6). [RT 4/12/23, 38–40; EIR 881, 2 (granting Bryan's Rule 20 motion as to especially cruel factor); *see also* EIR 926, 1–2].

In addition to the evidence presented during the guilt phase of the trial, Bryan presented evidence of approximately 86 noticed non-statutory mitigating circumstances and two statutory mitigating circumstances—capacity to appreciate wrongfulness under § 13-703(G)(1) and age under § 13-703(G)(5)—over the next 14 days of trial, which included the testimony of mental-health experts, family and friends, and observers of Bryan's life. [*See* EIR 926, 2–8].[3]

M. Special Verdict and Sentences

On June 7, 2023, the court delivered its special verdict, which recapped its prior findings of aggravation, its findings on the mitigation, the weight it was according to the mitigation, and its ultimate determination of sentence. [*See* EIR 926]. The court did not specify the weight it was according to any given aggravating

[3] The mitigation statute at the time of Bryan's offenses in 1992 and 1993 was A.R.S. § 13-703(G).

factor, though it stated towards the beginning of its verdict that the "heinousness and depravity surrounding [Angela and MB's] murders [was] clearly beyond the pale." [*Id*. at 2].

Turning to the mitigation, the court first discussed the mental-health evidence and whether it met the (G)(1) factor. [*Id.* at 5]. It observed that Bryan's experts—Dr. Cunningham, Dr. Weller, and Dr. Brand—diagnosed Bryan with Autism Spectrum Disorder, Hoarding, Post-Traumatic Stress Disorder ("PTSD") and Complex PTSD, Mood Disorder, Anxiety, Depression and Persistent and Major Depressive Disorder, Paraphilia Mixed, Attention-Deficit Hyperactivity Disorder ("ADHD"), Complex Trauma, Dissociative Disorder, Dissociative Amnesia, Other Specified Dissociative Disorder, and Panic Disorder Generalized. [EIR 926, 6].

It then observed that the State experts "generally agreed with the diagnoses of depression, anxiety, and hoarding"; that Dr. Dana-Kirby further agreed with the PTSD diagnosis, but Dr. Kohlhepp disagreed; that Dr. Dan-Kirby and Dr. Garby diagnosed Defendant as a sexual sadist; and that several State experts diagnosed Bryan with anti-social personality. [*Id*.].

The court first found that Bryan had sexual sadism disorder, adding that it was only considering it "as rebuttal to the proffered mitigation and not as an additional aggravating factor," and appeared to reject the notion that that diagnosis was causally connected to his mother's abuse. [*Id*. at 6–7]. It then found that Bryan

"suffers from depression, anxiety, and hoarding disorder"; that he does not have anti-social personality disorder; that he "may have high functioning Autism but the proof of that does not rise to the level of preponderance of the evidence"; and that he does not have "any of the dissociative disorders or PTSD." [*Id*. at 7].

It then concluded that "the nature and quality of these maladies are insufficient to establish the (G)(1) mitigating circumstance," citing evidence that Bryan recognized the wrongfulness of the Celeste Bentley stabbing, and the planning and obfuscation of involvement evinced in the offenses at issue. [EIR 926, 7–8].

The court next turned to the statutory mitigating factor of age under (G)(5). [*Id*. at 8]. It ultimately found the factor proven, expressly recognizing that Bryan's experience up through his age at the time of offense had been "marked by his mother's abuse," that "his executive functioning was still developing and his decision making would be affected," and that he "was immature for his age." [*Id*.]. However, the court added that Bryan had at least average intelligence, planned and executed two murders, and did not have "a low moral culpability based on his age, mental health deficits, or emotional defects." [*Id*.]. Nevertheless, the court found that this was one of two factors entitled to the "most weight." [*Id*. at 25].

The court then went on to address the non-statutory mitigating factors and found that 38 had not been proven by a preponderance of the evidence. [*Id*. at 8–

16].[4] It found the remaining 48 had been proven. [*See id*. at 16–22]. Of those, it expressly gave little weight to 11 factors. [EIR 926, 7, 17–21].[5] For 15 factors, though, the court did not identify what weight it was according to the factor. [*Id.* at 16, 18–21].[6] The court also found two factors that Bryan did not expressly notice: familial support, the weight of which was not specified, and Bryan's offer to plead no contest, which was given little weight. [*Id.* at 21].

---

[4] They were: burned by cigarettes, traumatic death of father, attachment disorder, abandonment and effect on mental health, traumatic divorce, victim of domestic violence, victim of sexual abuse, traumatic death of family pet, no evidence of criminal history since 1992, emotional instability, emotional dysregulation, mother received no prenatal care, lack of medical treatment, inadequate medical services, trauma from medical treatment, poor coping mechanisms, early exposure to violent literature, childhood isolation, extreme isolation, lack of positive peer relationships, racially discriminatory environment, psychological effects of home confinement, deprivation of freedom at early age, impaired relationships due to mother, dissociative incidents, general head trauma, brain injury, traumatic brain injury, suicidal ideation, inability to develop mature social bonds, participation in counselling, lack of bonding to male role models, lack of bonding to female role models, victim of bullying, impact of mother's death, impact of grandmother's death, impact of mother's relationships, and low moral culpability.

[5] They were: family history of alcohol abuse, Bryan's lack of substance abuse, mental health issues, lack of early intervention, alcoholism in family, only child, hoarding, positive work history, artistic talents, obtaining GED, and victim of infidelity.

[6] They were: loss of parental figure, depression, extreme anxiety, lack of psychological treatment, inadequate psychological services, institutional failures, death of father at early age, positive parenting skills, positive involvement in subcultures, positive relationships with adult friends, positive relationships with women, positive life progress after the offenses, non-confrontational nature, not a future danger, and vulnerability in prison.

For the remaining 22 factors it found, the court grouped them under the rubric of childhood abuse and found that they were collectively entitled, along with the statutory age factor, to the "most weight." [*Id*. at 21–25]. While discussing the abuse factors, the court found that Bryan was "not a reliable reporter," which was based on his conflicting statements regarding his offenses and interest in violent sex and pornography, and thus only found instances of abuse that were corroborated by third-party accounts. [*Id*. at 22].

The court nevertheless observed that much of the abuse Bryan recounted had been corroborated, and apparently only found that he was not shown two particular sexually violent films by his mother. [*See id*. at 22–25]. Indeed, the court remarked at the end of its discussion, "All the evidence leaves this Court with a picture of a childhood marred by abuse and neglect." [*Id*. at 25].

Finally, the court stated that it must "consider the quality and the strength, not simply the number, of aggravating and mitigating factors" when "weighing aggravation and mitigation," and observed that "[t]he question for the court then is; if the mitigation is sufficiently substantial to call for leniency." [*Id*.] It ruled, "[t]he answer is no." [*Id*.]. The court therefore "ordered that the Defendant, Bryan Patrick Miller is sentenced to death by lethal injection as required by A.R.S. § 13-704(A) for Angela Brosso and either lethal injection or lethal gas for [MB]." [*Id*.].

The court ordered that the death sentences for Counts 1 and 2 be served concurrently to one another and concurrently to the 7-year concurrent sentences it imposed on the dangerous kidnapping convictions for Counts 4 and 5; it further imposed 5-year terms on the dangerous attempted sexual assault convictions for Counts 5 and 6 and, without specifying why, ran those sentences consecutive to one another and to the homicide and kidnapping sentences. [RT 6/7/23, 18; EIR 929, 3; EIR 912, 1–2 (awarding 3067 days of credit for Counts 3 through 6)].

N. Post-Judgment Proceedings

Immediately following sentencing, Bryan filed a timely notice of appeal. [EIR 923]. On June 19, 2023, he filed a motion for a new trial, arguing that the trial court applied an unconstitutional weighing framework for sentence-imposition purposes, failed to give effect to all the mitigation evidence, and failed to conduct a proper self-assessment following the guilt phase. [EIR 930]. The court, however, denied the motion. [EIR 950]. On September 6, 2023, Bryan submitted an amended notice of appeal to incorporate the post-judgment proceedings that was accepted for filing two days later.

This Court has jurisdiction under Article 6, Section 5(3) of the Arizona Constitution, and A.R.S. §§ 13-4031 and 13-4033(A)(1).

ARGUMENT 1

The warrantless seizure and subsequent search of a presumptively innocent person's genetic information violate the state and federal constitutions.

Standard of Review:

This Court reviews a trial court's ruling on a motion to suppress evidence under two standards of review: the court's factual findings are reviewed for an abuse of discretion, and the court's legal conclusions about those facts are reviewed *de novo*. *See State v. Mitcham*, __ Ariz. __, ¶ 13, 559 P.3d 1099, 1104 (2024) (Fourth Amendment), *petition for certiorari filed* Feb. 4, 2025 (No. 24-6511); *State v. Mixton*, 250 Ariz. 282, 285–86 ¶ 11 (2021) (Private Affairs Clause).

Additional Facts:

On August 6, 2020, Bryan filed a motion to suppress the genetic-information evidence from the warrantless seizure of his saliva and the subsequent search of it under both the Fourth Amendment to the United States Constitution and the Private Affairs Clause of Article 2, section 8 of the Arizona Constitution, which he claimed provided broader protections. [EIR 451; *see also* EIR 452 (exhibits)]. He argued that he maintained "a reasonable expectation of privacy in his genetic information" and that "dining in a private establishment" does not forfeit it. [*Id.* at 5, 7; *see also id*. at 13–14 ("To allow law enforcement to seize a free person's DNA in a private dining

establishment would eviscerate constitutional privacy protections for genetic information the moment an individual leaves his/her residence.")].

The State responded that a person does not have privacy in their genetic information, and the Government should not be required to obtain a warrant. [EIR 460, 4–11]. It also claimed that Bryan "knowingly" exposed his genetic information in that he was not forced to use the restaurant's drinking mug, he "made no effort to clean" the restaurant's table of his discarded hair or skin, "nor … tr[ied] to take the place settings with him" when he left. [*Id.* at 2–4]. Finally, the State maintained that leaving genetic material wherever one goes is "so prevalent in the American zeitgeist of modern-day crime solving" that there is no legitimate or objective expectation of privacy in the information. [*Id.* at 8–9]. It did not address the Private Affairs Clause. [*Id.* at 1–11; *accord* EIR 470, 3].

In his reply, Bryan maintained that "entering a private establishment does not constitute knowingly exposing his entire genetic code." [EIR 470, 2]. He also emphasized that depositing genetic material is neither knowing nor conscious, and that society expects that the police will *not* follow people around, wait for an opportunity to seize what their body sheds, and then search their genetic information without their knowledge or consent. [*Id.* at 4–5]. Finally, he clarified that his "expectation of privacy is in his DNA, not the mug. The object law enforcement

impounded when seizing Bryan's DNA does not invalidate Bryan's expectation of privacy." [EIR 470, 5].

On December 11, 2020, the court held an evidentiary hearing on the matter. [RT 12/11/20 AM; R.T. 12/11/20 PM; EIR 486]. At the hearing, Bryan again emphasized that "it's not the seizure of the mug that is at issue. It's his reasonable expectation of privacy in his DNA." [RT 12/11/20 PM, 72]. He also explained that "abandonment" refers not to physical items, but rather to whether someone's conduct evinces that they have abandoned their reasonable expectation of privacy. [*Id.* at 76, 101]. And, he argued, just being "accessible" in public and "dining in a restaurant" does not "give up [a] reasonable expectation of privacy" because "you don't expect [anyone] to take your DNA and process it," as "restaurants are not in the business of conducting their own genetic analysis, nor would you expect law enforcement to do that in a restaurant." [*Id.* at 83–84]. Finally, he asserted that a finding of abandonment here would mean that "[y]ou are essentially subject to government intrusion at any point in time because no matter where you go, whatever place, whatever business, they can take it, they can process it and they can catalog it." [*Id.* at 86–87; see also *id*. at 104 ("If we accept that argument, we really eviscerate privacy protections because we are always involuntarily shedding DNA wherever we go, whatever we touch, whatever we do.")].

The State rejoined that the physical mug "is where the DNA was collected and that is the property of Chili's which was left behind"; a diner who leaves a restaurant does not "get to control" the restaurant, and Bryan's choice "not to take anything with him" meant that he abandoned his genetic information that the police could then warrantlessly seize. [RT 12/11/20 PM, 93, 95, 97].

On January 21, 2021, the court denied the motion to suppress, first rejecting the claim that the Arizona Constitution provides broader protections because the alleged illegality here did not involve a warrantless home entry. [*See* EIR 492, 4–5]. It then found that "the evidence the Defendant abandoned the mug at the restaurant is conclusive." [*Id.* at 5]. It reasoned that Bryan had no subjective expectation of privacy "as to the mug" and that there was no objective expectation of privacy in it either, as it would not be "consistent with societal standards to recognize an expectation of privacy in a used item left on a restaurant table." [*Id.*].

To retain their privacy in their genetic information, the court tasked the restaurant's diner with stealing the restaurant's table setting:

> The fact remains that the onus would be on a customer to both interrupt the expected table-clearing efforts of restaurant staff and somehow abscond with the restaurant's table setting to maintain some intent to retain a privacy interest in the property [which] supports the reasonable expectation of abandonment, not privacy.

[*Id.*]. And it rejected Bryan's argument that people expect employees to clear the table and sanitize dishware, analogizing the situation to the decision to throw

something away in the garbage—the mug was "discarded," and left in a place "particularly suited for public inspection." [EIR 492, 5–6 (quoting *California v. Greenwood*, 486 U.S. 35, 39–41 (1988))].

The court therefore concluded that Bryan "abandoned the mug in a public place, and therefore, had no reasonable expectation of privacy concerning the DNA testing of it to identify him as a suspect in a criminal investigation." [*Id.* at 6–7].

During the subsequent trial, Miller twice renewed his objection on the Fourth Amendment and the Arizona Constitution's "more specific" protection in Article 2, Section 8. [RT 10/10/22, 120, 139–44]. The court, however, reaffirmed its ruling. [*Id.* at 143–44].

Discussion:

A known, presumptively innocent person, that is "an unsuspecting member of the general public" who has not been arrested for any crime, *State v. Burns*, 988 N.W.2d 352, 386 (Iowa 2023) (Oxley, J., dissenting), should have the right to dine in public without the police warrantlessly capturing something as private as their genetic information under both the Fourth Amendment to the United States Constitution and Article 2, Section 8 of the Arizona Constitution.

In this case, the only physical evidence that directly linked Bryan to the offenses derived from the unreasonable seizure of his body's saliva, followed by an unreasonable search of it for his genetic information. But because Bryan did not

abandon his DNA profile, and that information is protected under both the state and federal constitutions, his profile, and all evidence derived from it, must be suppressed.

A. The Fourth Amendment protects against the warrantless search and seizure of Miller's genetic information.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. Amend. 4. A search or seizure without a warrant is presumptively unreasonable. *Katz v. United States*, 389 U.S. 347, 357 (1967). There are two kinds of searches that the Fourth Amendment guards against: one physical—a trespass at common law against a person's person, house, papers, and effects—and one conceptual—an incursion into a person's legitimate expectation of privacy. *See United States v. Jones*, 565 U.S. 400, 407–10 (2012); *Katz*, 389 U.S. at 360.

1. The Fourth Amendment protects genetic information as a matter of common law trespass.

Through the lens of common law trespass, the Government's intrusion alone is "enough to establish that a search occurred." *Florida v. Jardines*, 569 U.S. 1, 11 (2013); *see also State v. Mitcham*, CR-23-0235-PR, Rec. Oral Arg. at 16:25–41 (Justice Bolick questioning whether "we even need to get to reasonable expectation of privacy" if the warrantless and consent-exceeding search of blood for its genetic information amounts to a trespass). Here, a person's genetic information should be

deemed a person's "person" and "papers," and the government's intrusion into it should be deemed a trespass search.

a. A person's genetic information constitutes a person's Fourth Amendment "person."

A person's genetic information forms part of their Fourth Amendment "person" because that is from where it derives. *State v. Burns*, 988 N.W.2d 352, 390–91 (Iowa 2023) (McDermott, J., dissenting); *see also Maryland v. King*, 569 U.S. 435, 469 (2013) (Scalia, J., dissenting). And because a person's genetic information is part of a person's Fourth Amendment "person," intrusion into it should be deemed a trespass and search. *See Skinner v. Railway Labor Executives' Assoc.*, 489 U.S. 602, 616–18 (1989) (holding that the "collection and subsequent analysis" of "biological samples must be deemed Fourth Amendment searches"); *see also Birchfield v. North Dakota*, 579 U.S. 438, 462–63 (2016); *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251 (1891) (describing controlling one's own person as the most "sacred" and "carefully guarded" right).

b. A person's genetic information constitutes a person's Fourth Amendment "papers."

A person's genetic information also forms part of a person's Fourth Amendment "papers" because they operate in the same way—they store and reveal a person's private information (such as where they were, and what they did), much like a Fourth Amendment-protected cell phone. *See Burns*, 988 S.W.2d at 391

(McDermott, J., dissenting); *cf. id.* at 387 (Oxley, J., dissenting). Accordingly, intrusion into these "papers" should be deemed a trespass search.

2. The Fourth Amendment protects genetic information as a matter of the reasonable expectation of privacy.

Recently, in *Mitcham*, this Court held that developing a DNA profile from a person's biological material is a "search" within the meaning of the Fourth Amendment because it violates a person's reasonable expectation of privacy. *See* 559 P.3d at 1112 ¶ 24 ("We therefore conclude that extracting Mitcham's DNA profile in 2018 from the second vial of blood taken during his 2015 DUI arrest was a 'search' under the Fourth Amendment."). And here, in the context of genetic information obtained from a public restaurant, additional considerations further support finding a reasonable expectation of privacy.

First, a presumptively innocent person's expectation of privacy in their genetic information accords with the Government's criminalization of theft. The law of personal property prevents a person from "absconding" with a restaurant's place setting. *See, e.g.*, A.R.S. § 13-1802(B) & (G). And because it is unlawful to take items from a restaurant with genetic information on them, i.e., take that protective measure oneself, it is reasonable to expect that the information left on them will not be intruded upon.

Second, the expectation's legitimacy accords with Arizona's civil health codes that require a restaurant's silverware and drinking cups to be sanitized after

each and every use. [EIR 470, 4 n.2 (citing Arizona Department of Health Services, Title 9, Ch. 8, Art. 1, Ch. 4 ("Equipment, Utensils, and Linens."))]. And because the law requires sanitization after use, it is reasonable to expect that dining will not reveal one's genetic code.

Third, the presumptively innocent person's legitimate expectation of privacy in their genetic information accords, at least here, with the publicly available privacy policy of the restaurant. The owner of Chili's is Brinker International, which has publicly posted its privacy policy that declared that, at least in the preceding twelve months from June 15, 2020, the company and its restaurants do not collect biometric information. [EIR 470, 4 n.1 (citing Brinker Privacy Policy at 7)].

Accordingly, while the Court has already recognized that a person has a reasonable expectation of privacy in their DNA profile, additional considerations in this context support finding such an expectation here.

B. The Arizona Constitution's Private Affairs Clause protects a presumptively innocent person's privacy in their genetic information.

The voter-elected delegates to the Arizona Constitutional Convention enshrined the right to privacy in this State's highest source of law:

> No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

Ariz. Const. Art. 2, § 8.

Thus far, this Court has interpreted the Private Affairs Clause consistent with the scope of protections afforded by the Fourth Amendment. *Mixton*, 250 Ariz. at 290 ¶ 31, 292 ¶ 41. Accordingly, because *Mitcham* held that extracting a DNA profile from biological material is a "search" by virtue of that action infringing a reasonable expectation of privacy for Fourth Amendment purposes, the Arizona Constitution must similarly protect a person's genetic information. *Mixton*, 250 Ariz. at 306 ¶ 110 (Bolick, J., dissenting) ("Given that the framers of article 2, section 8 intended to incorporate the protections of the Fourth Amendment … these decisions form at minimum the baseline for the rights protected.").

But there are additional textual and historical reasons why genetic information is a "private affair" within the meaning of Article 2, Section 8 of the Arizona Constitution. *See Mixton*, 250 Ariz. at 289 ¶ 28.

1. The Private Affairs Clause protects information that is personal, nonpublic, and unique.

This Court has observed that the word "private," as understood at the time of the Arizona Constitution's adoption, means "affecting or belonging to private individuals, as distinct from the public generally," and "peculiar to one's self; personal, alone; secret; not public; secluded; unofficial." *Mixton*, 250 Ariz. at 290–91 ¶ 33 (quoting *Private*, Black's Law Dictionary (2d. ed. 1901); *Private*, New Websterian Dictionary (1912)). Accordingly, the Private Affairs Clause shields information from the Government that is personal, nonpublic, and unique. *See id.*

2. A person's genetic information is personal, nonpublic, and unique.

A person's genetic information is personal to them, it is rarely known to the public at large (and sometimes even unknown to the person), and it is never duplicated. *See Mario W. v. Kaipio*, 230 Ariz. 122, 127 ¶ 20 (2012) (recognizing that the searching of the seized genetic information "reveals uniquely identifying information about individual genetics"); *id.* at 128 ¶ 27 (stressing the "greater privacy concern" engendered by the subsequent search of the seized genetic information that is "effectively unique to that individual"), *overruled on other grounds in Mitcham*, 559 P.3d at 1106 ¶¶ 23–24.

Genetic information also presents "a wealth" of "highly personal information" that "could potentially be obtained." *Birchfield v. North Dakota*, 579 U.S. 438, 462–63 (2016). Indeed, our genetic information "goes beyond *who* we are to *what* we are." *State v. Athan*, 158 P.3d 27, 44 (Wash. 2007) (Alexander, C.J., concurring) (emphasis added). And because a person's genetic information is nothing if not *highly* personal, *rarely* public, and *always* unique, the Arizona Constitution's Private Affairs Clause should protect the right to privacy in a presumptively innocent person's genetic information.

3. The right to privacy in genetic information is reasonable.

That a person's genetic information "reveals intimate or discrete details of a person's life," is necessary, but not sufficient: a Private Affairs Clause claimant must

also show that the privacy interest is objectively reasonable. *See Mixton*, 250 Ariz. at 306 ¶ 111 (Bolick, J., dissenting). Here, applying the Private Affairs Clause to genetic information is objectively reasonable based on what the public understood to be private affairs at the time the clause was adopted and existing precedent.

First, around the time of the Arizona Constitution's adoption, the American people considered "private affairs" to include personal matters when "gathered by the government," which included identifying information. *Mixton*, 250 Ariz. at 291–92 ¶ 36; *see also id*. at 305 ¶ 108 (Bolick, J., dissenting) (describing how the "*Arizona Republican* editorialized against a proposal to disclose the names of their subscribers"). Here, what was gathered by the government is the personal matter of a man's bodily fluids, and what was searched without any authorization is the personal matter of one's own identifying genetic code.

Second, also around the time of the adoption, the American people began to see the work of detectives and forensic science as intruding on a person's private affairs, with its specialized equipment and ability to expose the previously un-exposable. *See* Timothy Sandefur, *The Arizona "Private Affairs Clause,"* 51 Ariz. St. L.J. 723, 726–27 nn.18–19 (2019). Here, the seizure occurred through police detective work, and the search occurred through specialized forensic-science equipment that is "not in general public use." *See Kyllo v. United States*, 533 U.S. 27, 40 (2001); *State v. Jean*, 243 Ariz. 331, 338 ¶ 25 (2018).

Third, around the time of adoption, the American people embraced a "none of your business" approach to Government examination of "secret diseases" and "hidden diseases." Note, *The Right to Privacy in Nineteenth Century America*, 94 Harv. L. Rev. 1892, 1904–06 (1981). Here, the search of genetic information can reveal "our predisposition to suffering from certain genetically-determined diseases." *Burns*, 988 S.W.2d at 391 (McDermott, J., dissenting); *State v. Mitcham*, CR-23-0235-PR, *Brief of Amici Curiae American Civil Liberties Union and American Civil Liberties Union of Arizona in Support of Appellee*, 2024 WL 3548563 **4–8, 16–17 (June 11, 2024).

Fourth, precedent weighs in favor of validating the privacy expectation in one's genetic information as objectively reasonable. Given what the Private Affairs Clause already expressly protects or impliedly supports—for example, the assurance of secrecy in serving as a juror, *Morgan v. Dickerson*, 253 Ariz. 207, 214 ¶ 28 (2022) (Bolick, J., concurring), the assurance of "secrecy in voting," *Huggins v. Superior Court (Patton)*, 163 Ariz. 348, 351 n.2 (1990), the right to "chart [one's] own plan of medical treatment," *Rasmussen by Mitchell v. Fleming*, 154 Ariz. 207, 215 (1987), and the right to be free from baseless grand-jury investigations, *Marston's, Inc. v. Strand*, 114 Ariz. 260, 268 (1977) (Gordon, J., specially concurring in part and dissenting in part)—a presumptively innocent person's genetic information should

be deemed private because the intimacy and identifying power of genetic information surpasses what the provision already rightly protects.

Accordingly, it "adheres to both the text of the private affairs clause and the intent of the framers" to include a presumptively innocent person's genetic information "within its protection." *See Mixton*, 250 Ariz. at 309 ¶ 127 (Bolick, J., dissenting). Genetic information is thus protected under both the state and federal constitutions, and abandonment should not change this result.

C. The doctrine of abandonment should not apply to genetic information.

The trial court found that Bryan abandoned his genetic information by walking away from the mug where his saliva was deposited and therefore had no reasonable expectation of privacy in the DNA profile that police developed from it. [EIR 492]. But the doctrine of abandonment should be found wholly inapplicable in this context for two reasons.

1. "Abandoning" genetic information is not analogous to traditional forms of abandonment.

In the traditional case of abandonment, e.g., throwing something in the trash or leaving something in the street, the thing seized and searched was the intentional object of the person's act of relinquishment and the person could reasonably expect others to retrieve that thing. *See People v. Pirillo*, 78 A.D.3d 1424 (N.Y. App. 2010) (finding no abandonment where defendant was not "making a conscious and independent decision to abandon the property"); *United States v. Thomas*, 864 F.2d

843, 846 (D.C. Cir. 1989); *State v. Valles*, 925 N.W.2d 404, 408 (N.D. 2019) ("[a]bandonment is primarily a question of intent"); *Greenwood*, 486 U.S. at 40 ("It is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public," and "the trash collector").

But that's not the case with biological material that contains genetic information. Genetic material, by involuntary biological necessity, is deposited on anything we touch. *See* Elizabeth E. Joh, *Reclaiming "Abandoned" DNA: The Fourth Amendment and Genetic Privacy*, 100 Nw. U. L. Rev. 857, 858 (2006). And, if we examine our everyday experience, we simply don't consciously think about that collateral consequence of virtually every action we take in public.

For example, when we throw a used bag in the trash, the conscious, intentional object of that action is to relinquish the bag—relinquishing the skin cells that necessarily come with it is not a part of the thought process. Similarly, when we reach for a glass of wine and put it to our mouth at a restaurant, the conscious object of that action is to take temporary possession of the glass and achieve a sip from it—we don't also consciously think, "and I'm also going to deposit my genetic material on this glass for anyone to test and learn about after I leave."

We also don't expect that anyone is going to swab the things we discard or touch in public for scientific analysis. Indeed, it's not "common knowledge" that

whenever one leaves genetic material on an object, someone is going to carefully swab the surface, preserve the sample from cross-contamination, and submit it to a laboratory for testing. *See* Yaniv Heled & Liza Vertinsky, *Genetic Paparazzi: Beyond Genetic Privacy*, 82 Ohio St. L.J. 409, 411 (2021) (opining such collection may soon be possible but is currently only the subject of "hypothetical debates").

Accordingly, it "is simply unrealistic" to apply the abandonment doctrine to genetic information or, as the trial court seemed to do here, bootstrap in the voluntariness and intentionality required to find abandonment of genetic information merely by finding that the thing on which the genetic information was deposited was voluntarily and intentionally relinquished. Joh, *Reclaiming "Abandoned" DNA*, 100 Nw. U. L. Rev. at 867; *Burns*, 988 N.W.2d at 392–94 (McDermott, J., dissenting); *Athan*, 158 P.3d at 44 n.7 ("a defendant leaving or discarding a tangible piece of property in a public place that others may find and examine is conceptually different from leaving our skin cells behind wherever we go in public") (Alexander, C.J., concurring).

2. The nature of genetic information should preclude application of the abandonment doctrine.

In *Carpenter v. United States*, the Supreme Court declined to extend the third-party doctrine to cell-site location information ("CSLI") due to the indispensability of cellphones in daily life, the inability of cellphone users to meaningfully limit the creation of CSLI records, and the scope of privacy issues CSLI records implicate.

See 585 U.S. 296, 315 (2018). Here, for the same reasons that the Court declined to apply the third-party doctrine to CSLI records, this Court should decline to apply the analogous abandonment doctrine to genetic information.

At the outset, the Supreme Court has analogized the third-party doctrine to the abandonment doctrine, as both involve voluntary conduct exposing otherwise private information to others. *See Greenwood*, 486 U.S. at 41 (citing *Smith v. Maryland*, 442 U.S. 735 (1979)).

And, like the indispensability of cellphones, which generate CSLI records, interaction with objects in public spaces, which deposits genetic information, is "indispensable to participation in modern society." *See Carpenter*, 585 U.S. at 315. It's simply impossible to do those activities that comprise modern life—working, dining, dating, and leisure—without entering the public sphere and touching and physically interacting with the objects in it.

Similarly, just as cellphone users cannot meaningfully control the creation of CSLI records, people can "in no meaningful sense" control the biological reality of involuntarily shedding their DNA on objects in the public sphere. *See id.*; Joh, *Reclaiming "Abandoned" DNA*, 100 Nw. U. L. Rev. at 868. Indeed, the only options for control are to either remain in the home or unrealistically employ specific cleaning methods after every single interaction with an object in public. *See* Martina

Nilsson, et al., *Evaluation of Different Cleaning Strategies for Removal of Contaminating DNA Molecules*, 13 Genes 162 (2022).

Finally, like the "detailed chronicle of a person's physical presence" that CSLI is capable of revealing, genetic information can reveal a detailed chronicle of who a person is—their ancestry, genetic defects and predispositions, and physical traits. *See generally* Allison Durkin, *Estimating A Face: What Predicting Appearance from DNA Reveals About the Need to Regulate Genetic Investigations*, 101 Wash. U.L. Rev. 1241, 1281 (2024).

Accordingly, considering the nature of the information at issue here, this Court should decline to apply the abandonment doctrine to genetic information based on the same logic that the Supreme Court relied on to find the third-party doctrine inapplicable to CSLI in *Carpenter*. *See Burns*, 988 N.W.2d at 393–94 (McDermott, J., dissenting) (rejecting application of abandonment doctrine to genetic information based on the logic of *Carpenter*).

D. The doctrine of abandonment, even if applicable for Fourth Amendment purposes, should not apply here because it is inconsistent with the Private Affairs Clause.

If genetic information is indeed a protected private affair, under the logic of the *Mixton* dissent, which this Court should adopt, the Court should find that abandonment, at least where predicated on merely walking away from an object that has been touched and left in public, is inconsistent with the Arizona Constitution.

The *Mixton* dissent, contrary to the majority, found that the information at issue, IP addresses and ISP subscriber information, was a private affair, and thus protected by Article 2, Section 8, even though it had been conveyed to a third-party internet service provider, which rendered it unprotected under the Fourth Amendment. 250 Ariz. at 308 ¶ 121.

Part of its reasoning for this was historical evidence that the public would have understood that the disclosure of private information to a third party remained private. *See id*. at 305 ¶¶ 106–08 ("It appears clear that the common meaning of 'private affairs" in statehood-era Arizona encompassed the type of business transactions that would be swept up by the third-party doctrine many decades later."). It also reasoned that the information at issue would remain a private affair under Washington's constitutional private affairs test. *Id*. at 309 ¶ 127 ("we would ask (1) whether the search encompasses intimate details of a person's life, and (2) whether the disclosure of information was made for a limited purpose and not for release to other persons for other reasons").

Here, the information at issue is consistent with what the public would have understood to be a private affair at the time the Arizona Constitution was adopted. Indeed, Americans at the turn of the 20th Century balked at the idea of having to disclose "secret diseases" on the census, as it was a "subject[] about which Americans felt the government had no right to ask," "[e]ven with guarantees of

confidentiality." *The Right to Privacy in Nineteenth Century America*, 94 Harv. L. Rev. at 1905; *accord Rasmussen*, 154 Ariz. at 215. Similarly, it appears that ancestry was also something turn-of-the-century Americans thought to be a private matter. *See* Daniel J. Sharfstein, *The Secret History of Race in the United States*, 112 Yale L.J. 1473, 1489, 1504 (2003).

Accordingly, at the time of adoption, it was thought that these personal facts should remain private as a person goes about their public life. It would be inconsistent with the public understanding of a private affair to conclude that genetic information becomes fair game just because a person touched something in public.

The Washington private affairs test further confirms that genetic information, even when left in public, is a private affair. First, as just discussed, searching biological material for genetic information can reveal intimate details of a person's life. Durkin, *Estimating A Face*, 101 Wash. U.L. Rev. at 1281. Second, when someone "discloses" their genetic information by taking a sip from a glass in a public restaurant, it's done for a commonsense, limited purpose—to quench thirst or enjoy the liquid inside. It's simply not done with the intention to convey a DNA profile or any other information about the person's genetics. *See Mixton*, 250 Ariz. at 309 ¶ 126 (Bolick, J., dissenting) (citing *State v. Boland*, 800 P.2d 1112, 1116 (Wash. 1990) (holding that although someone placing a garbage can expect scavengers to snoop through it, "[p]eople reasonably believe that police will not indiscriminately

rummage through their trash bags to discover their personal effects")). Accordingly, deeming genetic information abandoned and wholly unprotected is inconsistent with the Private Affairs Clause under the Washington test as well.

Ultimately, this Court should consider adopting the framework for analyzing the Private Affairs Clause set forth in the *Mixton* dissent and hold that genetic information, even when left in a public space from touch, still implicates a protected private affair under the Arizona Constitution.

E. Even assuming abandonment could apply, the "abandonment" here was not voluntary.

Abandonment must be intentional and voluntary. *United States v. Lewis*, 921 F.2d 1294, 1302 (D.C. Cir. 1990); *Valles*, 925 N.W.2d at 408. And "abandonment may be involuntary, and thus invalid, where it results directly from police misconduct, such as an illegal search or seizure, deceit, or, perhaps, a pattern of harassment." *Lewis*, 921 F.2d at 1302. In other contexts, implied promises by police can render an action, such as a confession, involuntary. *State v. Tapia*, 159 Ariz. 284, 290 (1988); *Malloy v. Hogan*, 378 U.S. 1, 7 (1964).

Even if the abandonment doctrine does apply, and leaving a mug in a restaurant is considered relinquishment of any genetic material on it, Bryan's "abandonment" here was not voluntary. First, police procured his genetic material through deceit by posing as employees of a security company who wanted to interview him for a job. [RT 10/10/22, 73–74]. That deceit directly led to Bryan

sitting down with officers and drinking from the mug because, but for the deceitful ruse, Bryan would not have entered the Chili's and drank from the mug.

Second, the deceit involved an implied promise—a promise that if Bryan sat down with the officer and engaged in an interview, he would have a real opportunity to be hired for a job. Indeed, before the mock interview, the officer "told him that we'd pay him for his time [if hired], and that [he] would meet with him later and get an employment application filled out." [*Id*.]. Bryan then relied on that implied promise of a job opportunity. Not only did he meet with the officers to fill out the application, but he also expressly told the officers he was interested in the job. [*Id*.].

The promise of a job opportunity here is a sufficient implied promise. For example, in *State v. McFall*, the defendant, a drug user, asked officers for drugs during a custodial interrogation, and the officers told him that the "matter would be discussed after we had taken care of the business at hand." 103 Ariz. 234, 236 (1968). This Court held that the defendant's subsequent confession was involuntary because the police response to the defendant's request constituted an implied promise—i.e., "some hope of obtaining drugs if he cooperated." *Id.*

Here, similarly, police left Bryan with some hope of obtaining a job if he dined with them at Chili's. And that deceit and promise should therefore render any abandonment of his DNA directly stemming from that state action involuntary.

F. The remedy for the disturbance of private affairs and the warrantless Fourth Amendment search here should be exclusion, and the trial court's error in failing to grant exclusion was not harmless.

Because (1) Bryan did not abandon his genetic information, (2) the extraction of his DNA profile was a protected search within the meaning of the Fourth Amendment and Private Affairs Clause, (3) that search was done without a warrant, and (4) no warrant exception is applicable here, exclusion of Bryan's DNA profile, and all evidence derived from it, is reasonable and the proper remedy in this case. *See Mitcham*, 559 P.3d at 1108 ¶¶ 32–33; *State v. Ault*, 150 Ariz. 459, 466 (1986).

Indeed, exclusion is reasonable in the circumstances here, where police are seizing and searching the genetic information of a *known* person and have the opportunity to establish probable cause to obtain a warrant for that person's DNA. Exclusion may not be reasonable, however, where police search the genetic information of a then-*unknown* person, e.g., genetic material left at a crime scene.

Accordingly, the trial court erred in failing to suppress the evidence of Bryan's DNA profile and all evidence derived from it. And that error was not harmless beyond a reasonable doubt. *See State v. Paxton*, 186 Ariz. 580, 586 (App. 1996).

As the State's arguments demonstrated, the DNA profile police obtained was the most important evidence in this case, as it was the only direct evidence linking Bryan to the offenses. [*See* RT 10/10/18, 8 (describing the "forensic evidence in this

case" as "the most important part of the guilt/innocence phase"); RT 4/5/23, 23–27]. And the remaining evidence was simply not overwhelming.

This Court should therefore reverse and remand this matter to the trial court for a new trial.

ARGUMENT 2

The execution of people who committed their crimes when they were under the age of 21 violates the Eighth Amendment's Cruel and Unusual Punishments Clause of the United States Constitution.

Standard of Review:

This Court reviews *de novo* the trial court's interpretation of federal constitutional law. *See State v. Montoya*, __ Ariz.__, ¶ 96, 554 P.3d 473, 505 (2024).

Additional Facts:

On March 20, 2020, Bryan filed a motion to dismiss the possibility of the death penalty based on his 20-year-old age at the time of the offenses. [EIR 377; *see also* EIR 379 (exhibits)]. He argued that decreasing amounts of executions and death sentencings of Americans under the age of 21, combined with the modern scientific research on brain development, preclude capital punishment for those under 21 at the time of their crime because they are insufficiently culpable for such punishment as a matter of constitutional law under the rationale of *Roper v. Simmons*, 543 U.S. 551, 564–75 (2005). [EIR 377, 3–7].

The State did not challenge that the States and the federal government are turning away from executing people who committed their crimes when they were under 21, nor did it challenge that the human brain remains in a pre-adult posture through at least the age of 21. [*See* EIR 380, 1–5]. Rather, the State responded that *Roper*, which outlawed the execution of people under 18 at the time of their offenses,

does not apply because Bryan committed the offenses here when he was over 18 years old, and the Court lacked authority to expand it. [*Id.* at 3–4].

Bryan replied that, rather than asking the court to overrule or disregard the opinions of this Court and the Supreme Court, he was asking the court "to follow their guidance." [EIR 393, 1; *see also id.* at 2 (urging a ruling "*consistent* with constitutional precedents and norms") (emphasis added)]. He added that nothing in *Roper* precluded the court from dismissing the potential death penalty for the category of under-21 offenders. [*Id.* at 2–3].

During the hearing on the motion, the court noted that *Roper* acknowledged a 17-year-old may be more mature than a 19-year-old yet still drew a line at 18 and asked, "[H]ow do we get around that?" [RT 5/15/20, 103]. Bryan replied that the post-*Roper* research he submitted demonstrated "the exact same premise" that *Roper* found, "which is that juveniles are different from adults in three very distinct ways." [*Id.* at 103–07; *accord* EIR, 377, 3–7 (citing *Roper*, 543 U.S. at 569–71)]. The State declined to add anything on this issue. [*Id*. at 108].

The trial court summarily denied the motion. [RT 5/15/20, 108]. In a later written ruling, the court expressly recognized that the prosecution did not disagree with two of the defense contentions: (1) "[t]he scientific research presented in defendant's Motion"; and (2) that "[i]n the 15 years since *Roper*, relevant medical and scientific research has reached a point of recognition within those relevant

medical and scientific communities that people age 18–21 are similarly situated to juveniles under the age of 18 years old." [EIR 438, 2]. But despite this, the court still denied relief because it found it could not extend *Roper*. [*Id.* at 3–4].

Discussion:

This Court can and should find, under the logic and reasoning of *Roper*, as well as the Supreme Court's other Eighth Amendment categorical exclusion jurisprudence, that executing someone who committed a capital offense under the age of 21, like Bryan, is unconstitutional.

A. The logic and reasoning of *Roper* and *Graham* dictate that a person who comitted a capital offense while under the age of 21 should be categorically ineligible for the death penalty.

The Eighth Amendment, which applies to the States via the Fourteenth Amendment, prohibits the infliction of "cruel and unusual punishments." U.S. Const. Amend. 8. It includes "the right not to be subjected to excessive sanctions," and this protection looks to "the evolving standards of decency that mark the progress of a maturing society." *Roper*, 543 U.S. at 560–61 (citation omitted).

One way the Court has implemented the Eighth Amendment's protection against excessive and disproportionate sentences is through "certain categorical restrictions on the death penalty." *Graham v. Florida*, 560 U.S. 48, 59 (2010). In cases adopting categorical rules, the Court has taken the following approach:

> The Court first considers "objective indicia of society's standards, as expressed in legislative enactments and state practice," to determine whether there is a national consensus against the sentencing practice at issue. Next, guided by "the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose," the Court must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution.

Id. at 61 (internal citations omitted). "The [latter] judicial exercise of independent judgment [in turn] requires consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question." *Id*. at 67.

Applying this approach, the Court held, in *Roper*, that "[t]he Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed." 543 U.S. at 579. This was because (1) "[a] majority of States" had already outlawed imposition of the death penalty on such offenders, evincing a national consensus, and (2) the qualities of juveniles that distinguish them from adults reduce juveniles' moral culpability to such an extent that that imposition of the most severe punishment, death, was disproportionate in the Court's independent judgment. *Id*. at 568–74. The culpability-diminishing qualities of juveniles that the Court found, which were all supported by scientific research, included a "lack of maturity and an underdeveloped sense of responsibility," greater "vulnerab[ility] or susceptib[ility] to negative

influences and outside pressures, including peer pressure," and characters that are "not as well formed" as adults'. *Id*. at 569–70.

Five years later, in *Graham*, the Court again applied its categorical exclusion framework to hold that "[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." 560 U.S. at 59. Notably, with respect to the national consensus prong of the test, the Court noted that a majority, "[t]hirty-seven States as well as the District of Columbia[,] permit sentences of life without parole for a juvenile nonhomicide offender in some circumstances." *Id.* at 62. Despite lacking a majority of States that had already banned the sentence under consideration as a matter of law, which was present in *Roper*, the Court nevertheless found a national consensus against imposing a life without parole sentence on a nonhomicide juvenile offender. *Id*. at 67.

This was because the Court recognized "[t]here are measures of consensus other than legislation," such as "[a]ctual sentencing practices." *Id*. (citing *Kennedy v. Louisiana*, 554 U.S. 407, 433 (2008)). And those practices, documented in studies and governmental statistics, revealed that there were only 124 juvenile nonhomicide offenders serving life without parole sentences, 77 of which came from only one state with the remainder coming from only 10 states. *Id*. at 64. Accordingly, because only 11 states were "in fact" imposing life without parole sentences on juvenile offenders, demonstrating that "[t]he sentencing practice now under consideration is

exceedingly rare," the Court held that "it is fair to say that a national consensus has developed against it." *Id*. at 64, 67 (citation omitted).

Here, under the Court's categorical exclusion framework, imposition of the death penalty on an 18-to-21-year-old offender violates the Eighth Amendment because that sentence is similarly exceedingly rare, evincing a national consensus against it, and these offenders share the reduced-culpability characteristics of juveniles, rendering the death penalty a disproportionate punishment.

1. There is a national consensus against the execution of 18-to-21-year-olds, as indicated by the rarity of the practice.

At the outset, 23 States and the District of Columbia have outlawed capital punishment, and there is a pause on executions in four States. *See* Death Penalty Information Center ("DPIC"), *State by State* (last visited Feb. 20, 2024); *see also* John H. Blume, et al., *Death by Numbers: Why Evolving Standards Compel Extending Roper's Categorical Ban against Executing Juveniles from Eighteen to Twenty-One*, 98 Tex. L. Rev. 921, 936–37 (2020) (21 states as of 2019). This is notably eleven more than when *Roper* was decided. 543 U.S. at 564.

"From January 2005 to December 2018, 546 people were executed in all jurisdictions in the United States; 106 (19%) were under twenty-one at the time of their crimes." Blume, *Death by Numbers*, 98 Tex. L. Rev. at 943; *see also* Brian Eschels, *Data & the Death Penalty: Exploring the Question of National Consensus Against Executing Emerging Adults in Conversation with Andrew Michaels's* A

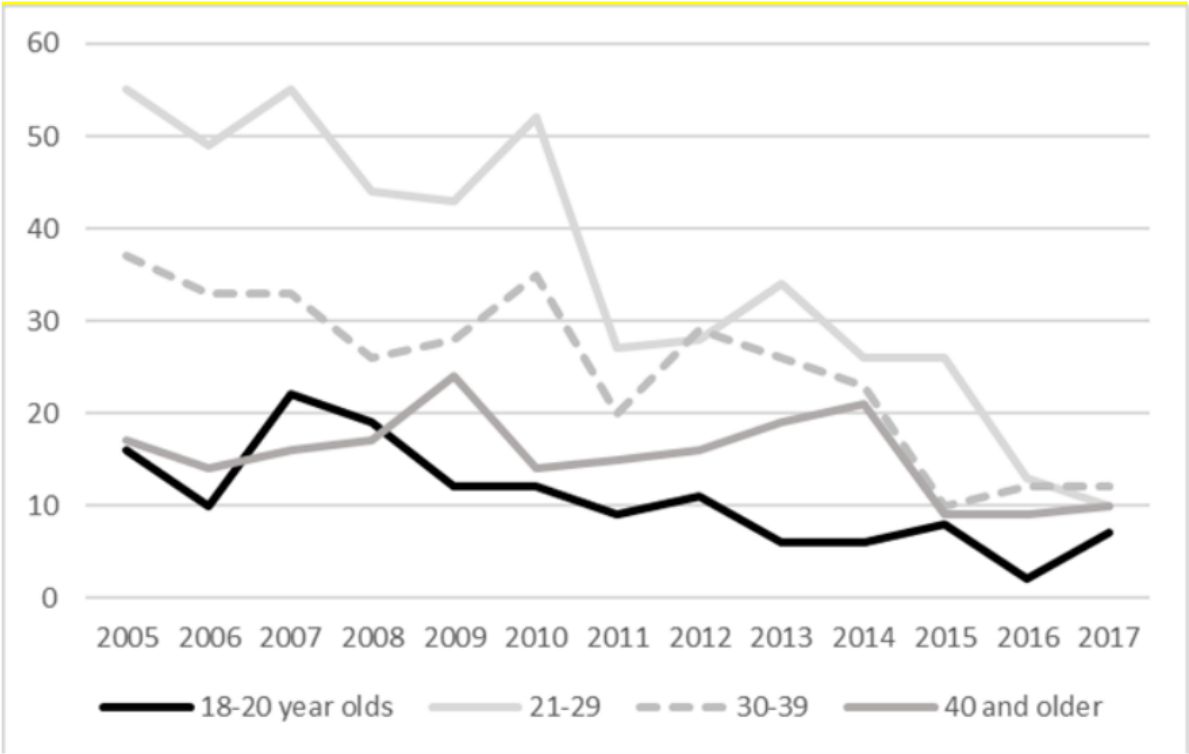
Decent Proposal: Exempting Eighteen- to Twenty-Year-Olds from the Death Penalty, 40 Harbinger 147, 152 (2016) (finding a total of 130 between 2001 and 2015). This is notably less than the number of juvenile nonhomicide offenders found to be serving life without parole sentences in *Graham*, 560 U.S. at 64.

Further, "[b]etween 2005 and the end of 2018, fifteen states have executed a person who was under twenty-one at the time of his offense," and "Texas, with fifty-six executions of youthful offenders, accounted for 55% of all of the young offender executions between 2005 and the end of 2018." Blume, *Death by Numbers*, 98 Tex. L. Rev. at 943; Eschels, *Data & the Death Penalty*, 40 Harbinger at 152 (finding 15 States between 2001 and 2015, with 77.69% occurring in just four states); *see also generally id*. at 150–51 (discussing difficulty in finding relevant execution statistics because only 3 sources provide age at time of offense and their data ends in 2014).[7] This is close to the 11 States accounting for all nonhomicide life without parole sentences found in *Graham*, 560 U.S. at 64.

In terms of death sentences imposed for under-21 offenders during this period, the number has declined since its peak in 2007:

[7] Counsel's research found that four under-21 offenders were executed in 2020 (Wardlow, TX; Mitchell, Vialva, and Bernard, U.S.), one was in 2021 (Jones, TX), four were in 2022 (Ramirez, TX; Reeves, AL; Postelle, OK; Johnson Jr., MI), six were in 2023 (Dudley and Brewer, TX; Sanchez, OK; McWhorter, AL; Tisius, MI; Barwick, FL), and five were in 2024 (Smith and Littlejohn, OK; Gonzalez, TX; Grason, AL; Owens, SC). *See generally* DPIC, Execution Database (last visited Feb. 20, 2025).

Figure 1: Death Sentences by Year and Age Group



Blume, *Death by Numbers*, 98 Tex. L. Rev. at 940. And "even when youthful offenders are arrested for homicide offenses, they are increasingly unlikely to receive death sentences when compared to older homicide offenders." *Id.*

The increasing downward trend since 2005, the year *Roper* was decided, held between 2018 and 2024, with a total of only five death sentences imposed on under-21 offenders in that period from only four states. DPIC, Defendants Sentenced to Death in 2018 (last visited Feb. 20, 2025) (no under-21 offender sentenced to death); DPIC, Defendants Sentenced to Death in 2019 (last visited Feb. 20, 2025) (one, FL); DPIC, Defendants Sentenced to Death in 2020 (last visited Feb. 20, 2025) (none);

DPIC, Defendants Sentenced to Death in 2021 (last visited Feb. 20, 2025) (one, CA); DPIC, Defendants Sentenced to Death in 2022 (last visited Feb. 20, 2025) (none); DPIC, Defendants Sentenced to Death in 2023 (last visited Feb. 20, 2025) (only Bryan Miller, AZ); DPIC, Defendants Sentenced to Death in 2024 (last visited Feb. 20, 2025) (two, CA and AL); *see also* Brian Eschels, *Data & the Death Penalty*, 40 Harbinger 147 at 149 (observing that "[a] second prominent source of statistics for the Court are those provided by the Death Penalty Information Center (DPIC), which has also been cited numerous times by federal and state courts.").

In view of the declining trend in the imposition of the death penalty for under-21 offenders over the last 20-plus years, the relatively low number of executions in that period, and the relatively small percentage of States actually imposing and executing that class of offenders in that period from the available statistics, this Court should find that a national consensus has emerged against executing people who were under 21 at the time of their offense. *See* Blume, *Death by Numbers*, 98 Tex. L. Rev. at 944.

2. The execution of 18-to-21-year-olds is a disproportionate punishment.

As the trial court here recognized, under-21 offenders, just like under-18 offenders, do not have a fully developed brain, and, as a result, share the culpability-reducing features of under-18 offenders that the *Roper* Court found sufficient to render imposition of the death penalty disproportionate. [*See* EIR 926 ("The court

recognizes his executive functioning [at age 20] was still developing and that his decision making would be affected")].

Courts, commentators, and the scientific community have similarly concluded that 18-to-21-year-old offenders possess the same culpability-reducing features of the under-18 class of offenders. [*See* EIR 379 (compiling law journal and scientific articles)]; American Psychological Association, *Resolution on the Imposition of Death as a Penalty for Persons Aged 18 Through 20, Also Known As the Late Adolescent Class* (Aug. 2020) ("APA concludes, based on the current state of the psychological and related developmental sciences, that … there is no neuroscientific bright line regarding brain development that indicates the brains of 18- to 20-year-olds differ in any substantive way from those of 17-year-olds"); *Commonwealth v. Watt*, 146 N.E.3d 414, 428 (Mass. 2020); *In re Monschke & Bartholomew*, 482 P.3d 276, 285–86 (Wash. 2021); *see also generally* Francis X. Shen, et. al., *Justice for Emerging Adults After* Jones*: The Rapidly Developing Use of Neuroscience to Extend Eighth Amendment Miller Protections to Defendants Ages 18 and Older*, 97 NYU L. Rev. Online 101, 104 (2022).

Accordingly, this Court should find, under the second prong of the Eighth Amendment categorical exclusion framework, that the execution of 18-to-21-year-olds is a disproportionate punishment.

B. This Court can build upon *Roper*, and the trial court's failure to do so here was not harmless error.

Roper did not, as the trial court construed it here, settle an inexorable line at age 18 that no court could ever extend. [*See* EIR 438, 2]. Rather, the *Roper* Court drew the line based on the facts before it and the national consensus that existed at the time of its decision.

And the Court's observation that "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18," *see Roper*, 543 U.S. at 574, was not, as the trial court appeared to construe it, [*see* EIR 926, 2], a recognition that the line it was drawing was so fixed that those persons would forevermore be out of Eighth Amendment luck; instead, in context, it was the opposite—a recognition that the line could change and that that group may very well meet the second prong of the categorical exclusion test.

Indeed, right after the Court's observation about some over-18 offenders, it explained that it was nevertheless drawing the line at 18 "[f]or the reasons we have discussed"—i.e., based on the then-existing national consensus about where the line should be drawn. *Roper*, 543 U.S. at 574. And, confirming that the Court was not precluding any extension of the line, it then observed that the very line it was drawing was itself an extension of the line it had previously drawn at age 16 in *Thompson v. Oklahoma*, 487 U.S. 815 (1988). *Id*.

The nature of the right conferred by the Eighth Amendment further confirms that categorical lines can be redrawn. This is because the scope of protections that the right affords depends on "the *evolving* standards of decency that mark the progress of a *maturing* society." *Graham*, 560 U.S. at 58 (citation omitted) (emphasis added). And the reason the Court looks to these changing standards "is because [t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but *its applicability must change as the basic mores of society change*." *Kennedy*, 554 U.S. at 419 (cleaned up) (emphasis added).

Finally, contrary to the trial court's belief it had no authority to rule in Bryan's favor on the issue here, [EIR 923, 3 ("this Court … cannot … expand the protections set forth in [*Roper*, *Graham*, and *Miller*]")], a state court can rely on constitutional reasoning, rationales, approaches, frameworks, and tests—which are binding—from U.S. Supreme Court decisions to reach novel constitutional holdings. *See State v. Adair*, 241 Ariz. 58, 62 ¶ 18 (2016) (reaching the holding after considering "the holdings *and* reasoning in that trilogy of Supreme Court cases" (emphasis added)); *Mitcham*, 559 P.3d at 1105–06 ¶¶ 21–24 (finding Supreme Court has not "addressed whether creating a DNA profile from the buccal sample was a separate 'search,'" and holding it was based on Arizona precedent applying Supreme Court Fourth Amendment search jurisprudence); *see also Ramos v. Louisiana*, 590 U.S. 83, 104

n.54 (2020) (citing F. Schauer, *Precedent,* Routledge Companion to Philosophy of Law 129 (A. Marmor ed. 2012) ("[T]he traditional answer to the question of what is a precedent is that subsequent cases falling within the *ratio decidendi*—or *rationale*—of the precedent case are controlled by that case")).

Ultimately, Bryan is not asking that this Court "modify" or "disregard" *Roper* or the holding of a higher court. *See State v. Sullivan*, 205 Ariz. 285 ¶ 15 (App. 2003). Rather, he is asking, just as he asked the trial court, to apply the Supreme Court's categorical exclusion framework—the binding reasoning behind *Roper*'s holding—to a new class of offenders. This the Court can do. And for the reasons discussed above, this Court should do it.

This Court should find that the trial court erred in denying Bryan's motion to dismiss the death penalty, which was not harmless because it would fundamentally change the sentencing outcome. *See State v. Forde*, 233 Ariz. 543, 574 ¶ 137 (2014) (**"**An illegal sentence constitutes fundamental error.").

ARGUMENT 3

The "was previously convicted" aggravating factor under A.R.S § 13-703(F)(2) (1992 & 1993) does not contemplate simultaneous convictions for offenses consolidated for trial purposes with a homicide.

Standard of Review:

An argument not raised below is reviewed for fundamental error. *State v. Dixon*, 226 Ariz. 545, 553 ¶ 32 (2011). In determining whether a legal error occurred, including the proper interpretation of a statute, review is de novo. *State v. Luviano*, 255 Ariz. 225, 227 ¶ 7 (2023).

Additional Facts:

As to the 1992 homicide (Count 1), the trial court found the A.R.S. § 13-703(F)(2) aggravating factor proven based on Bryan's simultaneous conviction for the 1993 kidnapping (Count 4) and attempted sexual assault (Count 6), which were consolidated with Count 1 for trial. [EIR 926, 1]. As to the 1993 homicide (Count 2), it similarly found the (F)(2) factor proven based on Bryan's simultaneous convictions for the 1992 kidnapping (Count 3) and attempted sexual assault (Count 5), which had also been consolidated for trial. [*Id.*].

Before making these findings, Bryan argued that although Counts 3 and 5 had been alleged as dangerous offenses, they could not serve as prior convictions involving violence or the threat of violence under the 1992 version of § 13-703(F)(2). [RT 4/11/23, 13–17]. He also argued that even if the dangerousness

allegation satisfied the violence requirement under the 1992 version of (F)(2), Count 5, the 1992 attempted sex assault, would not qualify as an (F)(2) prior because the 1992 version § 13-703(F)(2) did not specifically permit the use of convictions for preparatory offenses like the 1993 version. [RT 4/12/23, 9–10].

Finally, Bryan argued that his convictions for Counts 4 and 6 could not serve as (F)(2) priors because they were technically entered *after* his convictions for Counts 3 and 5. [RT 4/12/23, 9–10, 13–14; *see also* RT 5/15/20, 10].

Discussion:

When Bryan committed Counts 1 and 2, the text of § 13-703(F)(2), which creates an aggravating circumstance if the defendant "was previously convicted" of a violent or serious offense, neither plainly nor contextually applied to simultaneous convictions for offenses that were committed on a different occasion than the homicide but consolidated with a homicide offense at trial.

And, although past cases have held that § 13-703(F)(2) applies to simultaneous convictions for serious and violent offenses, they did so solely by relying on the general purpose of aggravation, not the text of § 13-703(F)(2). This Court disapproves of this way of interpreting statutes, and these past cases should therefore be reconsidered, particularly because secondary statutory construction principles further belie that construction of § 13-703(F)(2).

Accordingly, under § 13-703(F)(2), the trial court erred by relying on the simultaneous convictions on Counts 4 and 6 to aggravate Count 1 and by relying on the simultaneous convictions on Counts 3 and 5 to aggravate Count 2. This Court should therefore remand this matter for resentencing.

A. The text of § 13-703(F)(2) (1992 & 1993) plainly applies only to convictions that occurred in a separate case before the convictions in the present case, as this Court recognized in *State v. Hidalgo*.

"To determine a statute's meaning, [this Court] look[s] first to its text." *State v. Burbey*, 243 Ariz. 145, 147 ¶ 7 (2017). And, in doing so, "[the Court] give[s] words 'their ordinary meaning unless it appears from the context or otherwise that a different meaning is intended.'" *State v. Brearcliffe*, 254 Ariz. 579, 583 ¶ 12 (2023) (quoting *Arizona ex rel. Brnovich v. Maricopa Cnty. Cmty. Coll. Dist. Bd.*, 243 Ariz. 539, 541 ¶ 7 (2018)).

At the time of Bryan's 1992 offenses, § 13-703(F)(2) provided that the following was an aggravating circumstance in determining whether a sentence of death should be imposed for a first-degree murder conviction:

> The defendant *was previously convicted* of a felony in the United States involving the use or threat of violence on another person.

A.R.S. § 13-703(F)(2) (1992) (emphasis added). At the time of Bryan's 1993 offenses, the statute had been amended to apply to "serious" offenses, but it similarly provided that it only applied if the defendant "was previously convicted." A.R.S. § 13-703(F)(2) (1993).

The word "previous" has long meant "going before." *See Previous*, Merriam-Webster.com (last accessed October 16, 2024) ("going before in time or order"); *Previous*, New Websterian Dictionary (1912) ("going before; anterior"). Thus, when the adverb "previously" is used to qualify a verb expressing a past action, it plainly means that action came before something else. And that something else is ordinarily understood to be another known occurrence of the same action, not the moment at which a statement or question referring to what "previously" occurred is made.

For example, asking whether a person "was previously awarded" is ordinarily understood as asking whether the person received an award before some other known award, not whether the person received any award at any time before the question. Indeed, to ask whether a person has received an award at any time before the question, one would ordinarily simply ask whether the person "has been awarded." Thus, people ordinarily use "previously" to qualify a past tense verb when it is known that action has occurred once before.

This is how § 13-703(F)(2) worked in 1992 and 1993. At the time of the aggravation hearing, when the applicability § 13-703(F)(2) is being assessed, the defendant has (necessarily) just been convicted of one or more offenses at trial. Thus, when § 13-703(F)(2) asks whether the defendant "was previously convicted" of a violent or serious offense, the statute is plainly asking whether the defendant was convicted of that offense sometime *before* the conviction(s) that just occurred, not

whether the defendant was convicted of that type of offense any time before the aggravation hearing when § 13-703(F)(2) is being considered.

As such, if a defendant was convicted of a serious or violent offense at the same time as the homicide offense for which he is being sentenced—whether because it was committed on the same occasion as the homicide and concurrently charged or because it occurred on a different occasion but was concurrently charged and consolidated with the homicide offense for trial—§ 13-703(F)(2) plainly did not apply to that conviction in 1992 and 1993. The defendant was not *previously* convicted of such offenses—he was *simultaneously* convicted of them.

Indeed, this Court recognized as much in *State v. Hidalgo*. There, citing only the text of § 13-703(F)(2), the Court observed that before "the legislature amended the statute to include serious offenses concurrently committed or charged" in 2003, the "[(F)(2)] aggravator could not be established based on offenses *concurrently* committed *or charged*." *State v. Hidalgo*, 241 Ariz. 543, 558 ¶ 65 (2017) (citing A.R.S. § 13-703(F)(2) (1989 & Supp. 2000)) (emphasis added).

Accordingly, based on the plain language of § 13-703(F)(2), the trial court here erred (1) by using Bryan's convictions for the 1993 kidnapping and attempted sex assault, which were concurrently charged and consolidated with the 1992 homicide offense for trial, as aggravation for that homicide conviction and (2) by using the convictions for the 1992 kidnapping and attempted sex assault, which were

concurrently charged and consolidated with the 1993 homicide, as aggravation for that homicide conviction.

B. Context confirms that § 13-703(F)(2) applies only to convictions that occurred before the convictions in the case for which the defendant is being sentenced.

Context further supports that § 13-703(F)(2) only applies to violent or serious convictions that occurred before the convictions in the case for which the defendant is being sentenced. *See Nicaise v. Sundaram*, 245 Ariz. 566, 568 ¶ 11 (2019) ("We interpret statutory language in view of the entire text, considering the context and related statutes on the same subject."); *see also State v. Ewer*, 254 Ariz. 326, 330 ¶¶ 12–13 (2023) (resolving ambiguous text based on context).

The most closely related statute to § 13-703(F)(2) is § 13-703(F)(1), as it's part of the same statutory capital aggravation scheme as § 13-703(F)(2), and it similarly concerns when another conviction can serve as aggravation for a homicide conviction. In both 1992 and 1993, subsection (F)(1) provided that it was an aggravating factor if:

> The defendant *has been convicted* of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.

A.R.S. § 13-703(F)(1) (1992 & 1993) (emphasis added).

Unlike § 13-703(F)(2), § 13-703(F)(1) omits the adverb "previously" to qualify "convicted." And without this qualifying language, there is no reasonable

textual basis to believe that the conviction had to have occurred before the convictions in the case in which the defendant is being sentenced. Thus, § 13-703(F)(1)'s unqualified use of the present perfect tense "has been convicted," which signifies any conviction that exists up through the present time, i.e., at the time of the aggravation hearing when § 13-703(F)(1) is assessed, plainly refers to any conviction that occurred before the aggravation hearing.[8] *Accord State v. Tucker*, 215 Ariz. 298, 320 ¶ 98 (2007) ("[a]s long as the prior conviction is entered before the sentencing hearing, the conviction may support the (F)(1)").

That § 13-703(F)(2) uses different language than (F)(1) indicates that it has a different meaning, i.e., that it doesn't refer to any conviction that occurred before the aggravation hearing. *See Burns v. Arizona Pub. Serv. Co.*, 254 Ariz. 24, 31 ¶ 28 (2022) ("Where the drafters used different language in different provisions, we imply that a different meaning is intended."); *Comm. for Pres. of Established Neighborhoods v. Riffel*, 213 Ariz. 247, 249–50 ¶ 8 (App. 2006) ("when the

[8] Like in (F)(1), § 13-703(F)(8) provided that it was an aggravating factor if "[t]he defendant *has been convicted* of one or more other homicides, as defined in § 13-1101, which were committed during the commission of the offense." A.R.S. § 13-703(F)(8) (1992 & 1993) (emphasis added). The fact that "has been convicted" is also used here to refer to a conviction that likely occurred simultaneously with the homicide conviction being aggravated (because it occurred on the same occasion) further contextually supports the notion that the language "has been convicted" refers to any conviction entered before the aggravation hearing.

legislature uses different language within a statutory scheme, it does so with the intent of ascribing different meanings and consequences to that language").

Indeed, if "has been convicted" and "was previously convicted" both referred to any conviction that occurred before the aggravation hearing, then the addition "previously" in (F)(2) would be superfluous, as "was convicted," like "has been convicted," would alone be sufficient to refer to any past conviction that occurred before the aggravation hearing. *See Nicaise*, 245 Ariz. at 568 ¶ 11 ("A cardinal principle of statutory interpretation is to give meaning, if possible, to every word and provision so that no word or provision is rendered superfluous."); *Champlin v. Sargeant*, 192 Ariz. 371, 374 ¶ 16 (1998) ("Interpreting statutory language requires that we give meaning to each word, phrase, clause, and sentence within a statute so that no part will be superfluous, void, contradictory, or insignificant.").

The only viable alternative meaning for (F)(2) in context, then, is a conviction that occurred before the convictions in the present case, which the text of § 13-703(F)(2) plainly and reasonably supports.

Accordingly, because the related § 13-703(F)(1) aggravator omits the adverb "previously" and refers to any conviction that occurred before the aggravation hearing, context shows that the distinct inclusion of "previously" in § 13-703(F)(2) would refer to convictions that occurred at a different point in time—before the

convictions for which the defendant is being sentenced, which makes particular textual sense considering that "previously" modifies "convicted."

C. Past cases incorrectly relied on the general purpose of aggravation rather than the text of (F)(2). They should be reconsidered.

Several cases have construed the versions of § 13-703(F)(2) at issue here as applying to any violent or serious conviction that occurred before the aggravation hearing, including convictions that occurred simultaneously with the homicide conviction for which the defendant is being sentenced. *See, e.g.*, *State v. Gretzler*, 135 Ariz. 42, 57 n.2 (1983); *State v. Williams*, 183 Ariz. 368, 381–82 (1995); *State v. McKinney*, 185 Ariz. 567, 580 (1996); *see also State v. Valencia*, 124 Ariz. 139, 141 (1979) (holding courts can consider events that occurred after original sentencing, including conviction for a violent offense, during resentencing).

But they all did so not by examining the text and context of § 13-703(F)(2) but rather by solely and exclusively relying on the general purpose of aggravation. *See, e.g.*, *Valencia*, 124 Ariz. at 141 ("Revelation of subsequent lawless acts of violence would help to attain the objectives of the sentencing statute."); *Gretzler*, 135 Ariz. at 57 n.2 (because the "purpose of an aggravation/mitigation hearing is to determine the character and propensities of the defendant … [c]onvictions entered prior to a sentencing hearing may thus be considered regardless of … the order in which [they] were entered" (citing *Valencia*, 124 Ariz. at 141)); *Williams*, 183 Ariz. at 381–82 ("[T]he purpose of an aggravation/mitigation hearing is to determine the

character and propensities of the defendant. That a defendant had been found guilty of other lawless acts of violence is relevant to his character …. Thus, the validity of the trial court's (F)(2) finding is unaffected by the fact that the convictions were simultaneous" (citing *Gretzler*, 135 Ariz. 42, 57 n.2)); *McKinney*, 185 Ariz. at 580 ("The guiding principle in all these cases has been that the purpose of a sentencing hearing is to determine the character and propensities of the defendant and impose a sentence that fits the offender. These same principles apply to the (F)(2) factor present in this case.").

This way of interpreting statutes—by solely examining the purported general purpose of the scheme in which it appears—is not the law. Instead, this Court has repeatedly made clear that the proper legal framework is to first examine a statute's text and context to determine its meaning. *Burbey*, 243 Ariz. at 147 ¶ 7 ("To determine a statute's meaning, we look *first* to its text." (emphasis added)); *accord* *In re Riggins*, 257 Ariz. 1, 4 ¶ 12 (2024) ("When interpreting statutes, we *begin* with the text … considering the context and related statutes on the same subject." (cleaned up) (emphasis added)).

And it's only if the statute is ambiguous after this examination that courts should turn to secondary methods of interpretation, which includes consideration of the statute's purpose. *Burbey*, 243 Ariz. at 147 ¶ 7 ("Where the statutory language yields different reasonable meanings, we consider secondary interpretation methods,

including consideration of the statute's 'subject matter, its historical background, its effect and consequences, and its spirit and purpose.'" (citation omitted)); *Luviano*, 255 Ariz. at 228 ¶ 10 (2023) ("When a statute is ambiguous, we consult secondary interpretation methods, such as the statute's subject matter, historical background, effect and consequences, and spirit and purpose." (cleaned up)).

The persistent failure of past cases to look at the text of § 13-703(F)(2) in accord with the proper methodology for interpreting statutes is a good reason to revisit these cases. *See State ex rel. Arizona Dep't of Revenue v. Tunkey*, 254 Ariz. 432, 437 ¶¶ 22–24 (2023) (Bolick, J., joined by Beene, Montgomery, and King, JJ., concurring) (opining that, if raised, "[the Court] should entertain reconsideration" of a case because it employed a now-erroneous statutory interpretation methodology). And because "[a] more comprehensive review" of the text and context of § 13-703(F)(2), as analyzed in the sections above, shows that the analysis and result reached in these cases is manifestly "incorrect," and contrary to how this Court plainly read § 13-703(F)(2) to function in *Hidalgo*, there is also good reason to overrule them. *See State v. Agueda*, 253 Ariz. 388, 390 ¶ 15 (2022) (overturning prior interpretation of statute where prior interpretive analysis misapprehended text and was incorrect).

Moreover, in addition to failing to properly examine § 13-703(F)(2)'s text, the past cases construing § 13-703(F)(2) failed to consider a further, specific purpose of

§ 13-703 and other secondary interpretation methods, which, on balance, belie past cases' construction of § 13-703(F)(2) and instead support construing "was previously convicted" as a reference to convictions that occurred before the convictions for which the defendant is being sentenced.

D. Secondary interpretation principles support construing § 13-703(F)(2) as applying only to convictions that occurred before the convictions for which the defendant is being sentenced.

Although § 13-703(F)(2)'s text, in context, is not ambiguous as to whether it refers to convictions that occurred before the aggravation-hearing convictions that occurred before the convictions for which the defendant is being sentenced, to the extent the Court finds that it is, secondary interpretation principles, specifically purpose and legislative history, confirm it only applies to the latter. *Luviano*, 255 Ariz. at 228 ¶ 10 (secondary interpretation methods include the statute's historical background and purpose).

1. Purpose supports Bryan's interpretation of (F)(2).

Contrary to prior cases, the purpose of § 13-703(F) supports interpreting subsection (F)(2) as applying only to convictions that occurred before the convictions for which the defendant is being sentenced. As Arizona's capital aggravation statute, § 13-703(F) serves a vital and necessary constitutional purpose—to "narrow[] the class of persons eligible for death." *Hidalgo*, 241 Ariz. at 551–52 ¶ 28; *State v. Tucker*, 205 Ariz. 157, 169 ¶ 64 (2003) ("The purpose of

aggravating factors is to distinguish murders that are beyond the norm of first degree killings."); *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988) ("The use of 'aggravating circumstances' is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion."); *Zant v. Stephens*, 462 U.S. 862, 878 (1983) ("[S]tatutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty"); *see also Gregg v. Georgia*, 428 U.S. 153, 96–97, 200 (1976).

Accordingly, construing (F)(2) to more narrowly apply to convictions that occurred before the convictions for which the defendant is being sentenced, as opposed to more broadly applying to any conviction that occurred before the aggravation hearing, better advances § 13-703(F)'s constitutional narrowing purpose. *See State v. Rutledge*, 206 Ariz. 172, 176 ¶ 17, 177 ¶ 24 (2003) (affirming trial court's ruling that § 13-703(F)(2) did not apply to convictions for violent or serious offenses that occurred on the same occasion as the homicide because interpreting it otherwise would "broaden the class of death eligible defendants, contrary to the legislative intent to narrow that class of persons," and rejecting State's broader interpretation because it "would mean that a number of prior death penalties could have been supported by an additional aggravating factor.").

Past cases, however, all of which relied on *Valencia*, have stated that the purpose of § 13-703 "is to determine the character and propensities of the defendant." *See, e.g.*, *Gretzler*, 135 Ariz. 42, 57 n.2 (quoting *Valencia*, 124 Ariz. at 141); *State v. Steelman*, 126 Ariz. 19, 25 (1980) (same). But *Valencia* wasn't addressing the specific purpose of § 13-703, and, to the extent that it was, its conclusion about its purpose was erroneous. As such, the purpose-based rationale past cases used to construe the scope of (F)(2) is foundationally unsound.

At the outset, *Valencia* was referring to the purpose of an "aggravation/mitigation hearing" generally, not § 13-703 specifically, and it made this statement in the context of addressing whether it was unconstitutional for a resentencing court, in any case, to consider events that occurred after the original sentencing. 124 Ariz. at 141 ("Defendant next urges that it is fundamentally unfair to allow the court to consider events which could not have been used had defendant not exercised his right of appeal."). Thus, cases like *Gretzler* appear to have misconstrued *Valencia*'s statement about the broad, *general* purpose of aggravation as a statement about the *specific* purpose of § 13-703. And, in doing so, they erred by construing § 13-703(F)(2) to broadly apply to any conviction that occurred before the capital aggravation hearing.

Further, even assuming *Valencia*'s purpose language did specifically pertain to Arizona's capital aggravation statute, its conclusion about that purpose was

erroneous because it entirely failed to countenance the higher-order constitutional purpose of capital aggravation. And this failure appears to stem from *Valencia*'s inapposite reliance on *Williams v. New York*, 337 U.S. 241, 245 (1949), which was decided before the Supreme Court mandated that capital aggravation must genuinely narrow the class of death-eligible defendants.

Indeed, in rejecting the defendant's argument that resentencing courts cannot consider events that occurred after the original sentencing due to the broad purpose of aggravation, the *Valencia* Court relied on *North Carolina v. Pearce*, 395 U.S. 711, 723 (1969) (holding that the "trial judge is not constitutionally precluded … from imposing a new sentence, whether greater or less than the original sentence, in the light of events subsequent to the first trial that may have thrown new light upon the defendant's 'life, health, habits, conduct, and mental and moral propensities,'" (quoting *Williams*, 337 U.S. at 245)), and *Williams*, 337 U.S. at 245. *See Valencia*, 124 Ariz. at 141.

But the pre-*Gregg* aggravation scheme at issue in *Williams*, unlike Arizona's post-*Gregg* capital scheme at the time *Valencia* was being decided, permitted the trial court to broadly consider the defendant's background and character and was otherwise not statutorily identical. 337 U.S. at 245 ("New York judges are given a broad discretion to decide the type and extent of punishment for convicted defendants …. To aid a judge in exercising this discretion intelligently the New York

procedural policy encourages him to consider information about the convicted person's past life, health, habits, conduct, and mental and moral propensities.").

Accordingly, to the extent that *Valencia* was opining on the purpose of Arizona's capital aggravation scheme, it reached an incorrect result by relying on *Williams* and New York's capital aggravation scheme, which was pre-*Gregg/Zant* and broader than Arizona's scheme, to derive that purpose. As such, the purposivism rationale derived from *Valencia* and employed in the *Gretzler* line of cases is unavailing, and the constitutional purpose behind § 13-703(F) ultimately does not support broadly construing (F)(2) as applying to any conviction that occurs before the capital aggravation hearing.

2. Legislative history supports Bryan's interpretation of (F)(2).

The historical background of § 13-703(F) further supports construing (F)(2) as applying only to convictions that occur before the convictions for which the defendant is being sentenced. As the *Hidalgo* Court noted, the legislature amended (F)(2) in 2003 to include serious offenses "concurrently committed or charged." 241 Ariz. at 558 ¶ 65. More specifically, it added a new sentence in (F)(2) that specified, "Convictions for serious offenses committed on the same occasion as the homicide, *or not committed on the same occasion but consolidated for trial with the homicide*, shall be treated as a serious offense under this paragraph." 2003 Ariz. Sess. Laws ch. 255, § 1 (1st Reg. Sess.) (emphasis added).

Although the specification that convictions for serious offenses "consolidated for trial with the homicide" count under (F)(2) is consistent with the construction of (F)(2) in the *Gretzler* line of cases, the legislature nevertheless appeared, on balance, to be changing what (F)(2) plainly meant rather than codifying the past judicial constructions of (F)(2) that were inconsistent with its plain language.

First, the 2003 amendment was primarily "intended to displace [this Court's] ruling in *State v. Rutledge*, 206 Ariz. 172, 175–78 ¶¶ 15–25 & n. 3, 76 P.3d 443, 446–49 & n. 3 (2003), which held that crimes occurring during the same course of events as the murder could not serve as (F)(2) qualifying serious offenses," not to codify past constructions. *State v. Nordstrom*, 230 Ariz. 110, 118 ¶ 35 (2012).

Second, the House Fact Sheet for the 2003 amendment explained that the amendment was "*[a]dd[ing]*" "[c]onvictions for serious offenses … consolidated for trial with the homicide" "to the list of aggravating circumstances a trier of fact must consider in determining whether to impose a death sentence," which suggests that the legislature understood that those convictions were not aggravating circumstances under (F)(2) before the amendment. House Fact Sheet for S.B. 1267, 46th Leg., First Reg. Sess. (May 15, 2003) (emphasis added); *see also State v. Payne*, 223 Ariz. 555, 563 ¶ 25 n.5 (App. 2009) ("Arizona courts have cited Senate fact sheets as relevant legislative history" (citing, e.g., *State ex rel. Ariz. Dep't of Revenue v. Capitol Castings, Inc.*, 207 Ariz. 445, 449 ¶ 19 (2004))).

Third, and perhaps most importantly, the legislature didn't merely specify that "[c]onvictions for serious offenses … not committed on the same occasion but consolidated for trial with the homicide, shall be treated as a serious offense under this paragraph"; it also changed the language of that paragraph. And it notably did so by inserting "*has been* or" in front of "was previously convicted." 2003 Ariz. Sess. Laws ch. 255, § 1 (1st Reg. Sess.) (emphasis added).

The fact that the legislature incorporated the present perfect "has been" convicted language into (F)(2) in conjunction with its further specification that convictions for offenses consolidated with the homicide qualify as serious offenses under (F)(2) is significant to understanding what (F)(2) truly and plainly meant before the amendment (and why the past judicial constructions of it based on the general purpose of aggravation were wrong). Specifically, it confirms that "has been convicted"—not "was previously convicted"—is the language that means any conviction that occurs before the aggravation hearing, including simultaneous convictions for offenses consolidated with the homicide for trial.

Put differently, if the legislature did not add the "has been" language in (F)(2) but still specified, in a new sentence at the end of (F)(2), that convictions for consolidated offenses count, the amendment would be more reflective of a codification of the past judicial decisions that had already interpreted the "was previously convicted" language as including simultaneous convictions for

consolidated offenses, confirming those decisions got it right. But it didn't—the legislature instead added the "has been" language that's necessary to make (F)(2) plainly and newly apply to simultaneous convictions for serious offenses consolidated with the homicide for trial.

As such, the legislative history, on balance, supports the proposition that (F)(2) did not apply to such convictions before the 2003 amendments. And, therefore, the trial court erred by finding, as to each of the homicide convictions here, that Bryan "was previously convicted" of serious or violent offenses based on his simultaneous convictions for violent and serious offenses that had been consolidated with the homicide offenses for trial.

E. The sentencing error was fundamental and prejudicial, and Bryan is entitled to resentencing. At a minimum, this Court should not consider the (F)(2) aggravating factor in its independent review.

An error is fundamental if it goes to the foundation of the defendant's case, e.g., by "reliev[ing] the prosecution of its burden to prove a crime's elements … or depriv[ing] the defendant of constitutionally guaranteed procedures." *State v. Escalante*, 245 Ariz. 135, 141 ¶ 18 (2018). An error is also fundamental if it takes away an essential right, e.g., by "depriv[ing] the defendant of a constitutional or statutory right necessary to establish a viable defense." *Id.* at 141 ¶19. A fundamental error is prejudicial if, in its absence, a reasonable factfinder could reach a different result. *See id.* at 144 ¶ 31.

Here, the error in finding (F)(2) proven as to Counts 1 and 2 based on an invalid construction of (F)(2)'s language was fundamental because it went to the foundation of the case. More specifically, it deprived Bryan of an individualized sentencing determination, a constitutionally guaranteed procedure, in which the sentencer's discretion was guided by *legislatively* defined aggravation that served to narrow those eligible for the death sentence. *See Brown v. Sanders*, 546 U.S. 212, 221 (2006) ("The issue we confront is the skewing that could result from the jury's considering as *aggravation* properly admitted evidence that should not have weighed in favor of the death penalty."); *Stringer v. Black*, 503 U.S. 222, 230 (1992) ("We require close appellate scrutiny of the import and effect of invalid aggravating factors to implement the well-established Eighth Amendment requirement of individualized sentencing determinations in death penalty cases." (citations omitted)); *Hidalgo v. Arizona*, 583 U.S. 1196 (2018) (Souter, J., concurring in denial of certiorari) (emphasizing that aggravation, which in Arizona is used for both eligibility narrowing and sentence selection purposes, is legislatively defined).

The error was also fundamental because it took away an essential right. More specifically, by finding (F)(2) proven as to both Counts 1 and 2 based on an erroneously broad construction of the statute as it existed in 1992 and 1993, the prosecution was relieved of its burden to prove that aggravating factor beyond a reasonable doubt. *See State v. Dann*, 220 Ariz. 351 ¶ 65 (2009) ("[b]ecause an

aggravating circumstance is analogous to an element of a crime, it must be found beyond a reasonable doubt").

Further, the error in finding the (F)(2) factor proven based on an erroneous interpretation of the factor was prejudicial. Indeed, properly construed, the trial court would not have been able to find (F)(2) proven because the State failed to introduce any evidence that Bryan "was previously convicted" of a violent or serious offense *before* he was convicted of the offenses in the present case. And without this factor weighing in favor of death, the trial court could have reasonably imposed a life, rather than death, sentence. *See Stringer*, 503 U.S. at 232 ("[W]hen the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale.").

Although the trial court did not specify the individual weight it placed on each aggravating factor, it nevertheless considered the (F)(2) factor in its special verdict and expressly weighed it, along with the other aggravation. [*See* EIR 926, 1, 25]. Moreover, the court stated—at the very outset of its pronouncement of sentence—that Bryan not only "murdered [the victims]," but also "committed *other horrific crimes* upon them," which is what served as the (F)(2) aggravation. [EIR 924, 1 (emphasis added)]. The trial court added, before addressing the mitigation, that "[t]here is no question that what the defendant did," which included the non-

homicide offenses, "deserves the death penalty." [*Id.* at 2]. As such, the record shows that the trial court was influenced by the fact that Bryan was convicted of other violent or serious offenses committed on a different occasion.

Against the aggravation that included Bryan's simultaneous convictions for the violent or serious non-homicide offenses, the trial court found significant mitigation: 11 factors were accorded relatively little weight, 15 were accorded more weight because they were not expressly given little weight, and two—age, a statutory mitigating factor, and childhood abuse by his mother, which itself comprised 22 individual circumstances—were given the most weight. [EIR 926, 16–22].

Ultimately, the trial court found that this mitigation was not sufficiently substantial to call for leniency when weighed against aggravation that erroneously included the simultaneous (F)(2) convictions. But given that it still appeared to carry significant weight, had the aggravation excluded the simultaneous (F)(2) convictions in accord with a proper interpretation of the language of § 13-703(F)(2), a reasonable sentencer could have found that the mitigation, on balance, was sufficiently substantial to call for a life sentence.

The erroneous interpretation of § 13-703(F)(2), which led to that factor being found, was therefore fundamental, prejudicial error, and the Court should remand this matter for a resentencing. *State v. Bible*, 175 Ariz. 549, 608 (1993) ("remand for resentencing is the better rule" where "the trial judge erred with respect to

aggravating … circumstances and in which there is mitigating evidence of *some weight*" (emphasis added)).

Alternatively, to the extent the Court agrees that the language of (F)(2) does not apply to simultaneous convictions but finds that that error was not fundamental or prejudicial, Bryan respectfully requests that the Court, in conducting its independent review of the death sentence, not consider the (F)(2) factor. *Cf.*, *e.g.*, *Tucker*, 215 Ariz. at 310 ¶ 26, 323 ¶ 120 (declining to consider erroneous (F)(3) aggravating factor when conducting independent review despite deeming the insufficiency of the (F)(3) evidence a harmless error).

ARGUMENT 4

The consecutive sentences for Count 5 and 6, the attempted sexual assault convictions, violate double punishment.

Standard of Review:

This Court reviews the imposition of consecutive sentences, to which the defendant did not object, for fundamental error. *State v. Forde*, 233 Ariz. 543, 574 ¶ 137 (2014). In determining whether an A.R.S. § 13-116 error occurred, review is de novo. *State v. Urquidez*, 213 Ariz. 50, 52 ¶ 6 (App. 2006).

Additional Facts:

The trial court ran the sentences for the homicide convictions and the dangerous kidnapping convictions concurrently to one another but ran the sentences for the dangerous attempted sexual assault convictions consecutive to one another and consecutive to the homicide and kidnapping sentences. [RT 6/7/23, 18; EIR 929, 3; EIR 912, 1–2]. Bryan did not object to the consecutive sentences for the attempted sexual assault convictions.

Discussion:

Arizona's double punishment statute provides that "[a]n act or omission which is made punishable in different ways by different sections of the laws may be punished under both, but in no event may sentences be other than concurrent." A.R.S. § 13-116. In determining whether consecutive sentences violate the prohibition on double punishment, this Court applies a three-part test.

First, the Court "consider[s] the facts of each crime separately, subtracting from the factual transaction the evidence necessary to convict on the ultimate charge-the one that is at the essence of the factual nexus and that will often be the most serious of the charges." *State v. Gordon*, 161 Ariz. 308, 315 (1989). "If the remaining evidence satisfies the elements of the other crime, then consecutive sentences may be permissible," and the Court must "then consider[] whether, given the entire 'transaction,' it was factually impossible to commit the ultimate crime without also committing the secondary crime." *Id.* If it was, it's more likely that the defendant committed a single act, but the Court still must "consider whether the defendant's conduct in committing the lesser crime caused the victim to suffer an additional risk of harm beyond that inherent in the ultimate crime." *Id.* And, if it did, consecutive sentences are permissible. *Id.*

Here, the ultimate charges were the homicides and dangerous kidnappings. Those offenses on each occasion were predicated on the same evidence of the same act—the stabbing of each victim, while alive, in the back—because, as the State argued, that act both restrained each victim's movement *and* caused each victim to die. [*See* RT 4/5/23, 10–12 (arguing, as to Counts 3 and 4 and felony murder, that the evidence showed that "each woman … left separately, left their homes intending to go back home, and then they were attacked by the defendant, who stopped their progress. The attack led to the injuries that caused their death."); *see also* RT

10/4/22, 166–67 (testifying stab wound to back only identifiable antemortem wound as to 1992 victim); RT 10/10/22, 46 (testifying stab wound to back only identifiable antemortem wound as to 1993 victim); Ex. 414 (outlining "Plan" to kidnap, sexually assault, then murder young woman)]. And the trial court itself appeared to find that the kidnapping was based on the fatal stabbing because it rejected Bryan's sole Rule 20 argument as to Counts 3 and 4 that the stabbing could not legally constitute the kidnappings. [*See* RT 11/3/22, 98–100, 119–23; EIR 763]. Each kidnapping sentence was thus correctly run concurrently with each homicide sentence.

But the dangerous attempted sexual assault convictions that carried consecutive sentences were also based on the same evidence of that same act. Indeed, the trial court appeared to find that each attempted sexual assault in this case was the stabbing with an intent to commit sexual assault because it found that evidence sufficient to defeat Bryan's Rule 20 motion on Counts 5 and 6. [*See* EIR 763]. And the "Plan" evidence confirmed that a kidnapping would have been the initial step in a course of conduct planned to culminate in the commission of a sexual assault of a living victim. [*See* Ex. 414 (listing kidnapping as the first step of a plan to, inter alia, sexually assault a victim while alive before killing)].

But more importantly, no evidence except the fatal stabbing could have independently established the elements of a dangerous attempted sexual assault as to each victim. *See* *Gordon*, 161 Ariz. at 315.

For example, while evidence that Bryan went to the canal with a knife might meet the elements of an (A)(2) attempted sexual assault, that offense would involve the mere possession of a deadly weapon, not its use or exhibition, and therefore could not have constituted the *dangerous* attempted sexual assaults for which he was convicted. *Compare* A.R.S. § 13-604(K) (1992 & 1993) (defining dangerous offense, for enhancement purposes, as "a felony involving the use or exhibition of a deadly weapon or dangerous instrument or the intentional or knowing infliction of serious physical injury upon another"), *with* A.R.S. § 13-702(D)(2) (1992 & 1993) (providing that the "*[u]se*, threatened use *or possession* of a deadly weapon or dangerous instrument during the commission of the crime" is an aggravating factor (emphasis added)); *see also State v. Larin*, 233 Ariz. 202, 213 ¶ 40 (App. 2013) (noting, for purposes of dangerousness enhancement, that "[i]t is conceivable for a defendant or an accomplice to knowingly possess a deadly weapon or dangerous instrument without the discharge, use, or threatening exhibition of it").

The evidence that intercourse occurred after the victims died and that the knife was used to inflict postmortem cuttings, [*see* EIR 924, 1–2; EIR 926, 2], also could not have established the elements of a dangerous attempted sexual assault.

As an initial matter, a completed sexual assault requires a living victim. A.R.S. § 13-1406(A) (1992 & 1993) ("A person commits sexual assault by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any *person*"

(emphasis added)); A.R.S. § 13-105(23) (1992 & 1993) (defining "person" as "a human *being*" (emphasis added)); *Being*, Merriam-Webster Online Dictionary (last accessed Nov. 14, 2024) ("conscious existence"; "a living thing"); *see also State v. Gallegos*, 178 Ariz. 1, 9 (1994) (rejecting argument evidence insufficient to establish sexual assault because testimony established victims were alive).

As such, under the statutory definition of attempt, for acts committed on a decedent to constitute an attempted sexual assault, the defendant must have subjectively believed the decedent was still alive. For example, (A)(1) attempt requires "conduct which would constitute an offense *if the attendant circumstances were as such person believes them to be*." A.R.S. § 13-1001(A)(1) (1992 & 1993) (emphasis added). Postmortem intercourse, then, cannot constitute attempted sexual assault unless Bryan believed the circumstances were that the victims were still alive at the time, the element missing from that act otherwise constituting a completed sexual assault. Similarly, (A)(2) attempt requires an act "which, *under the circumstances as such person believes them to be*, is any step in a course of conduct planned to culminate in commission of an offense." A.R.S. § 13-1001(A)(2) (1992 & 1993) (emphasis added). Thus, for the postmortem use of the knife to be a step planned to culminate in a sexual assault of a living victim, Bryan likewise had to believe the circumstances at the time of its use were that the victims were still alive.

No evidence, however, shows that he subjectively believed the victims were alive at the time of the postmortem sex or cuttings. Indeed, the fact that the trial court found the (F)(6) aggravator necessarily reflects a finding that Bryan subjectively knew the victims were deceased when the postmortem cuttings occurred. [*See* EIR 926, 2; EIR 877, 4 (defining "needless mutilation" for purposes of (F)(6) aggravator as "acts after the victim's death and separate from the acts that led to the death of the victim, with the intent to disfigure the victim's body")]; *accord State v. Medina*, 193 Ariz. 504, 514 ¶ 38 (1999) (defining mutilation for purposes of (F)(6) aggravator as "evidence that defendant committed *distinct acts, apart from the killing itself*" with a "*separate purpose* to mutilate the *corpse*" (cleaned up) (emphasis added)).

Accordingly, under the first step of the *Gordon* double punishment test, after subtracting the evidence of the stabbings that supported the homicide and dangerous kidnapping convictions (and the dangerous attempted sexual assault convictions), "the remaining evidence" fails to "satisf[y] the elements of the other crime," i.e., the dangerous attempted sexual assaults, and consecutive sentences for those offenses were therefore impermissible under § 13-116. *See Gordon*, 161 Ariz. at 315.

Moreover, even assuming *arguendo* that the postmortem acts could satisfy the elements of a dangerous attempted sexual assault, consecutive sentences would still be impermissible under the second and third steps of the *Gordon* test. This is because it was factually impossible to have committed the postmortem cuttings and

intercourse without first fatally stabbing the victims in the back. And because the victims were deceased when those acts occurred, i.e., the victims had already suffered the greatest possible harm, death, the postmortem acts necessarily did not cause the victim to suffer an additional risk of harm.

Running the sentences for the attempted sexual assaults consecutive to the kidnapping and homicide sentences was therefore error, and that error was fundamental and prejudicial. *See Forde*, 233 Ariz. 543, 574 ¶ 137 (recognizing double punishment error, which results in an illegal sentence, is reversible fundamental error). The Court should therefore remand this matter for resentencing with instructions that the attempted sexual assault sentences must be run concurrently to the concurrent sentences for the kidnapping and homicides, *see Gordon*, 161 Ariz. at 316 (ordering remand for resentencing with instructions for concurrent sentences as remedy for double punishment error).

ARGUMENT 5

> The trial court's failure to state its reason for its consecutive sentences on Counts 5 and 6, the attempted sexual assault convictions, warrants a remand for the trial court to state its reason.

Standard of Review:

The standard of review for determining whether a trial court violated the requirement to state its reasons for consecutive sentences on the record pursuant to A.R.S. § 13-711(A) appears to be *de novo*. *See State v. Perez-Gutierrez*, 257 Ariz. 307, 313 ¶¶ 19, 24 (2024) (explaining that such a claim is not amenable to harmless, fundamental, or structural error review).

Additional Facts:

In imposing consecutive sentences for Counts 5 and 6, the trial court only explained:

> Regarding consecutive or concurrency, the Court finds that, based on the case law, it is safer for the Court to run the kidnaps concurrent with Counts 1 and 2 and the sex assault. However, the Court will run the sexual assaults consecutive to each other and then consecutive to Counts 1 and 2, if that made any sentence [sic].

[RT 6/7/23, 18].

Discussion:

A.R.S. § 13-711(A) provides that the court may run multiple sentences of imprisonment consecutively or concurrently, but "shall state on the record the reason for its determination." Recently, in *State v. Perez-Gutierrez*, this Court held that if

"a party establishes a § 13-711(A) violation, appellate courts should stay the appeal and remand the case for the trial court to correct its administrative error by explaining its sentencing determination on the record." 257 Ariz. at 313 ¶ 24.

In determining whether a § 13-711(A) violation occurred in *Perez-Gutierrez*, the Court appeared to simply examine whether any reasons were stated on the record. *See id*. at 312 ¶ 16 ("Here, the record is bereft of any discussion of relevant factors and how they led to the sentence imposed. The trial court, therefore, erred by failing to substantially comply with § 13-711(A).").

Here, like in *Perez-Gutierrez*, the trial court failed to state its reason for consecutive sentences on Counts 5 and 6 on the record. Interestingly, while the court seemed to acknowledge that there were reasons, which it did not state, from caselaw to impose concurrent sentences on Counts 5 and 6, it only stated that it was opting not to do so without any further discussion. [RT 6/7/23, 18 ("based on the case law, it is safer for the Court to run the kidnaps concurrent with Counts 1 and 2 and the sex assault. However, the Court will run the sexual assaults consecutive ….")].

This Court should therefore remand this matter to the trial court to state the reason for these consecutive sentences on the record if it does not find that the consecutive sentences violated double punishment. *See Perez-Gutierrez*, 257 Ariz. at 313 ¶ 24 n.1 (suggesting this issue is unique and that the defendant can still claim an error in consecutive sentences, whether objected to or not).

ARGUMENT 6

The trial court impermissibly double-counted the same facts in weighing the aggravation under A.R.S § 13-703(F)(1) and (F)(2) (1992 & 1993).

Standard of Review:

An argument not raised below is reviewed for fundamental error. *State v. Dixon*, 226 Ariz. 545, 553 ¶ 32 (2011). In determining whether a legal error occurred, including "[w]hether a trial court may employ a given factor to aggravate a sentence," review is de novo. *State v. Alvarez*, 205 Ariz. 110, 113 ¶ 6 (App. 2003).

Discussion:

For a capital sentencing scheme to comply with the Eighth Amendment, the discretion of the sentencer must be "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg v. Georgia*, 428 U.S. 153, 189 (1976). Such guided discretion may be achieved by using aggravating factors, but those factors "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. 862, 877 (1983).

Where the same fact is used to establish multiple aggravating factors, whether because one factor necessarily subsumes another or because they effectively overlap as applied, the weighing process becomes skewed, "creat[ing] the risk that the death sentence will be imposed arbitrarily and thus, unconstitutionally." *See United States*

v. McCullah, 76 F.3d 1087, 1111 (10th Cir. 1996) (citing *Stringer v. Black*, 503 U.S. 222, 230–32 (1992)) (addressing factors that necessarily overlapped); *Allen v. Woodford*, 395 F.3d 979, 1012 (9th Cir. 2005) (addressing factors that effectively overlapped as applied); *see also State v. Velazquez*, 216 Ariz. 300, 307 ¶ 22 (2007) (citing *Brown v. Sanders*, 546 U.S. 212 (2006)) (factfinder "may use one fact to find multiple aggravators, so long as the fact is not weighed twice when [the factfinder] assesses aggravation and mitigation."); *State v. Rose*, 548 A.2d 1058, 1096 (N.J. 1988) ("it is not improper for the prosecution to prove more than one aggravating factor based on the same evidence, provided the jury is carefully instructed that in weighing the aggravating factors against mitigating factors, it does not assign inordinate weight to the facts that support multiple factors").

Such double counting also risks violating double punishment principles. *See State v. Tittle*, 147 Ariz. 339, 345 (1985) ("On remand, the defendant's 1965 robbery conviction, if proved by the state, may properly constitute two aggravating circumstances, A.R.S. §§ 13-703(F)(1) and (2). However, in its balancing of factors, the trial court may only weigh aggravating circumstances arising out of the 1965 robbery once so as to avoid any possibility of double punishment."); *see also State v. Schad*, 163 Ariz. 411, 419 (1989).

For example, in *State v. Carlson*, this Court found a risk of improper double-weighing of the same facts in the aggravation found under § 13-703(F)(4), procuring

the commission of the offense by promise of payment, and (F)(5), committing the offense in the expectation of pecuniary gain. 202 Ariz. 570, 581 ¶ 39 (2002). It reasoned that both aggravators in the case before it appeared to be based on "one transaction"—"Defendant wanted her mother-in-law murdered so she would get the proceeds of the trust fund and annuities; she would then share a small portion of this money with Dan and Scott, the people she hired to commit the murder." *Id.* at 580–81. Accordingly, while the Court observed that it was permissible to find each factor based on the same factual transaction, they could not be weighed twice. *See id.*

Here, as to each homicide conviction, the trial court's weighing of the aggravation found under A.R.S. § 13-703(F)(1) and (F)(2) (1992 & 1993), as applied, violated Bryan's Eighth Amendment and double punishment rights because the (F)(1) and (F)(2) factors were both predicated on the same factual transaction—the stabbing of the other victim in the back, which established both the homicide conviction used under (F)(1) and the dangerous kidnapping and attempted sexual assault convictions used under (F)(2).

As the State argued and the trial court appeared to find, each homicide and dangerous kidnapping was factually predicated on the same act of stabbing the victim in the back while alive, as it restrained each victim's movement *and* caused each victim to die. [*See* RT 4/5/23, 12; *see also* RT 11/3/22, 98–100, 119–23; EIR 763]. Each dangerous attempted sexual assault was also, as the trial court appeared

to find, based on that same act, as it was the only act involving the use of a deadly weapon that, based on what Bryan believed at the time, was a step in a course of conduct planned to culminate in the sexual assault of a living person. [*See* Ex. 414; EIR 763]; *see also* A.R.S. § 13-1001(A)(2) (1992 & 1993); A.R.S. § 13-604(K) (1992 & 1993).

Indeed, while the evidence may have circumstantially shown that Bryan went to the canal *possessing* a knife on each occasion, which arguably constituted a completed attempted sexual assault, that act did not involve the *use* of the knife such that it could support a *dangerous* attempted sexual assault conviction. *See State v. Larin*, 233 Ariz. 202, 213 ¶ 40 (App. 2013). Further, the postmortem intercourse and cutting acts that the trial court found, [EIR 924, 1–2; EIR 926, 2], fail to establish an *attempted* sexual assault because for those acts to otherwise constitute a completed sexual assault, or a step towards its completion, Bryan had to have subjectively believed the victims were alive at the time of the postmortem acts, and no evidence showed he did. *See* A.R.S. § 13-1001(A)(1), (A)(2); *see also* Argument 4, *supra* (discussing how (F)(6) finding based on postmortem cuttings necessarily meant Bryan believed victims deceased at time).

Accordingly, the stabbing of each victim with the knife was the same factual transaction that established each set of convictions in this case. [*See also* RT 4/11/23, 25 (finding dangerous offense instructions, including the definition of serious

physical injury, applicable to all counts); *accord* EIR 862, 4 (instructing on dangerousness as to each offense)]. As such, when the trial court found aggravation as to each homicide based on the *other* homicide conviction under § 13-703(F)(1) and the *other* dangerous kidnapping and sexual assault convictions under § 13-703(F)(2), then weighed each of those aggravating factors to impose death, it double-weighed the same fact in violation of the Eighth Amendment and double punishment.

And the trial court here did weigh each aggravating factor, including (F)(1) and (F)(2), when assessing the aggravation and mitigation. As the court explained in its motion for a new trial ruling, "the Court weighed the strength and quality of *each* aggravating … factor before determining whether the mitigating circumstances were sufficiently substantial to call for leniency." [EIR 950, 3 (emphasis added)]. As "each" of the three aggravating factors in this case was weighed, the same fact—the stabbing of the other victim—was necessarily weighed at least twice, overcoming any presumption that the trial court declined to weigh either the (F)(1) or (F)(2) factor to avoid double-weighing. *See State v. Velazquez*, 216 Ariz. 300, 307 ¶ 22 (2007) ("A jury, like a sentencing judge, may use one fact to find multiple aggravators, so long as the fact is not weighed twice when the jury assesses aggravation and mitigation.").

As such, an error occurred in the sentencing determination here, and that error was fundamental and prejudicial. An error is fundamental if it goes to the foundation of the defendant's case, e.g., by "depriv[ing] the defendant of constitutionally guaranteed procedures." *State v. Escalante*, 245 Ariz. 135, 141 ¶ 18 (2018). An error is prejudicial if, in its absence, a reasonable factfinder could reach a different result. *See id.* at 144 ¶ 31.

Here, the error in double-weighing the same factual transaction under both § 13-703(F)(1) and (F)(2) was fundamental because it went to the foundation of the case, depriving Bryan of a constitutionally guaranteed procedure—a weighing process un-skewed by use of the same fact to prove multiple aggravating factors, risking arbitrary imposition of the death sentence. *See McCullah*, 76 F.3d at 1111; *see also Stringer*, 503 U.S. at 232.

This fundamental error was also prejudicial because if the same fact had not been weighed twice, the trial court could have reasonably imposed a life, rather than death, sentence. *See Stringer*, 503 U.S. at 232) ("[W]hen the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale."). Indeed, the trial court found the mitigation was significant and entitled to more than mere nominal weight.

For example, although the court expressly afforded "little weight" to 11 mitigating factors it had found proven, it declined to assign such weight to 15 mitigating factors, indicating those factors carried more than a mere nominal value in the sentencing calculation. [*See* EIR 926, 16–22]. And the trial court gave even greater weight to two additional mitigating factors—the abuse Bryan suffered at the hands of his mother and his young age at the time of the offenses, which was a statutory mitigating circumstance. [EIR 926, 8, 25].

Accordingly, had the trial court declined to weigh either the (F)(1) or (F)(2) aggravating fact as to each homicide because they were predicated on the same factual act, it could have reasonably concluded that the mitigation, which appeared to carry more than some weight, was sufficiently substantial to call for leniency. The erroneous double-weighing here was therefore fundamental, prejudicial error, and this Court should remand this matter for a resentencing. *State v. Bible*, 175 Ariz. 549, 608 (1993) ("remand for resentencing is the better rule" where "the trial judge erred with respect to aggravating … circumstances and in which there is mitigating evidence of *some weight*" (emphasis added)).

Alternatively, to the extent that the Court agrees that the same factual transaction was used to prove both the (F)(1) and (F)(2) factors as to each homicide, but the trial court did not double-weigh them, Bryan respectfully requests that the

Court not weigh both the (F)(1) and (F)(2) in conducting its independent review of the death sentence. *State v. Styers*, 177 Ariz. 104, 116 (1993).

ARGUMENT 7

To the extent that Count 4, the 1993 kidnapping, and Count 6, the 1993 attempted sexual assault, were not factually predicated on the fatal stabbing, it was error to designate the convictions for these offenses as dangerous, rendering Counts 4 and 6 violent offenses for purposes of aggravating Count 1 under A.R.S. § 13-703 (F)(2) (1992).

Standard of Review:

An argument not raised below is reviewed for fundamental error. *State v. Dixon*, 226 Ariz. 545, 553 ¶ 32 (2011). "This question of sufficiency of the evidence is one of law, subject to de novo review on appeal." *State v. West*, 226 Ariz. 559 ¶ 15 (2011); *see also State v. Thues*, 203 Ariz. 339, 340 ¶ 4 (App. 2002) (insufficient evidence of sentence enhancement is fundamental error).

Additional Facts:

Relying on *State v McCray*, 218 Ariz. 252 (2008), the trial court found, for purposes of aggravating Count 1, the 1992 homicide, that Bryan's convictions on Count 4 and 6, the 1993 kidnapping and attempted sexual assault, were offenses "involving the use or threat of violence" under A.R.S. § 13-703(F)(2) (1992) because the court had found that those offenses were dangerous offenses for sentence enhancement purposes. [EIR 926, 1; EIR 881, 2].

Discussion:

To the extent the State argues that Counts 4 and 6 were not predicated on the initial use of the knife to fatally stab the victim, the evidence was insufficient to

designate these counts as "dangerous" offenses. As such, Counts 4 and 6 would not be offenses "involving the use or threat of violence" under the 1992 version of § 13-703(F)(2) and thus could not serve as aggravation for Count 1.

A first-degree murder may be aggravated when "[t]he defendant was previously convicted of a felony in the United States *involving the use or threat of violence*." A.R.S. § 13-703(F)(2) (1992) (emphasis added). "In determining whether a prior felony involved violence or threats, [this Court] must look to the 'statutory definition' of the crime, not the particular facts of the case. *McCray*, 218 Ariz. at 257 ¶ 17 (citing *State v. Henry*, 176 Ariz. 569, 587 (1993)). Thus, "if the offense *could* have been committed without the use or threat of violence, the prior conviction does not qualify as an (F)(2) aggravator." *Id.*

Because kidnapping can, statutorily, "be perpetrated by deception as well as by force," this Court has repeatedly held that it does not qualify as a crime involving violence under the version of § 13-703(F)(2) applied here as to Count 1. *State v. Schackart*, 190 Ariz. 238, 246 (1997) (citing *State v. Bible*, 175 Ariz. 549, 604 (1993)). Similarly, this Court has held that a completed sexual assault is not a crime involving violence under the version of § 13-703(F)(2) at issue here. *Id.* (citing *Bible*, 175 Ariz. at 604). Thus, *a fortiori*, an attempted sexual assault would also not be a crime that, statutorily, involves violence. *See also* A.R.S. § 13-1001 (1994).

When an offense that would not otherwise qualify as a violent offense under § 13-703(F)(2) is designated as a "dangerous" offense for sentence enhancement purposes, however, this Court has held that the offense would "necessarily" involve violence for purposes of § 13-703(F)(2). *McCray*, 218 Ariz. at 258 ¶ 24 (citing A.R.S. § 13-604(G) (1989) (defining a "dangerous" offense as "a felony involving use or exhibition of a deadly weapon or dangerous instrument or … the intentional or knowing infliction of serious physical injury upon another")).

Here, because Counts 4 and 6, the 1993 kidnapping and attempted sexual assault, were enhanced as dangerous offenses, the trial court found that they qualified as offenses involving violence under the 1992 version § 13-703(F)(2) to aggravate Count 1. [EIR 926, 1; EIR 881, 2]. As discussed in Arguments 4 and 6 above, Counts 4 and 6, as dangerous offenses, must have been predicated on the initial act of fatally stabbing the victim because there was no other evidence of an act that met the elements of kidnapping and attempted sexual assault *and* that involved the use of a deadly weapon or dangerous instrument.

Accordingly, to the extent the State argues that Counts 4 and 6 were based on some act other than the initial fatal stabbing, Bryan claims that it would have been error to designate these counts dangerous, which is what allowed them to serve as aggravation for Count 1 under § 13–703(F)(2). And this designation error leading to an erroneous aggravation finding would be fundamental because it would have

skewed the sentencing calculus by introducing an aggravating factor that was not proven, and it would be prejudicial because, in the absence of that additional invalid aggravation, the trial court could have reasonably returned a life verdict as to Count 1 given the otherwise significant mitigation found.

ARGUMENT 8

This Court should spare Bryan's life under an independent review of the death sentences.

Standard of Review:

Because the offenses in this case occurred before 2002, this Court must independently review *de novo* both the trial court's aggravation and mitigation findings *and* the weight to be accorded to those findings in determining the propriety of the death sentences imposed. *State v. Lynch*, 238 Ariz. 84, 106 ¶ 79 (2015) (citing A.R.S. § 13-755(A)), *rev'd on other grounds*, *Lynch v. Arizona*, 578 U.S. 613 (2016); *State v. Bocharski*, 218 Ariz. 476, 492 ¶ 79 (2008); *State v. Tucker*, 215 Ariz. 298, 320 ¶ 96 (2007); *State v. Roseberry*, 210 Ariz. 360, 374 ¶ 77 (2005); *State v. Roque*, 213 Ariz. 193, 230 ¶ 166 (2006); *see also State v. Greene*, 192 Ariz. 431, 441 ¶¶ 43–45 (1998) (reviewing de novo whether trial court erred in failing to find mitigation under pre-2002 independent review).

Discussion:

"When there is a doubt whether the death sentence should be imposed, [this Court] will resolve that doubt in favor of a life sentence." *Bocharski*, 218 Ariz. 476, 499 ¶ 112 (quoting *Roque*, 213 Ariz. at 231 ¶ 170).

Here, such doubt exists.

A. The (F)(1) and (F)(2) aggravating factors should not be double weighed.

As discussed in Arguments 3, 4, 6, and 7, each set of convictions pertaining to each victim—murder, kidnapping, and attempted sexual assault—was predicated on the same fact—a single, rapidly fatal stab wound to the back committed with an intent to commit a sexual assault and homicide. And, as to each homicide conviction, the other homicide conviction served as aggravation under § 13-703(F)(1), and the other kidnapping and attempted sexual assault convictions served as aggravation under § 13-703(F)(2). [EIR 926, 1]. Accordingly, the same fact—a stabbing with a concurrent intent—served as aggravation under the (F)(1) and (F)(2) factors for both Count 1 and Count 2.

As such, assuming *arguendo* that the Court rejects Bryan's Issue 3 argument that the (F)(2) finding was legally erroneous, this Court should not double weigh this fact in considering the (F)(1) and (F)(2) aggravators during the court's independent review. *State v. Styers*, 177 Ariz. 104, 116 (1993) (finding that although there was "no error" because defendant failed to show double weighing actually occurred, the Court agreed it would consider the same fact used to prove multiple aggravators "only once" when "conducting our independent review and weighing of aggravating and mitigating circumstances").

B. The (F)(6) aggravating factor should not be given great weight.

The (F)(6) factor is disjunctive, meaning the State can prove either especial cruelty or heinousness and depravity, which in turn can be shown in five different ways. *See State v. Jimenez*, 165 Ariz. 444, 453, 455 (1990).

How the factor is proven, though, appears to affect its weight, as the different means of establishing especial cruelty, heinousness, or depravity seem to fall along a spectrum or hierarchy in value. *See State v. Spreitz*, __ Ariz. __, 561 P.3d 393, 399 ¶ 14 (2025) (observing that the Court often finds that "the especially cruel aggravator is particularly strong and 'is entitled to great weight'") (citing *State v. McKinney*, 245 Ariz. 225, 228 ¶ 15 (2018); *State v. Poyson*, 250 Ariz. 48, 57 ¶ 42 (2020)); *State v. Smith*, 146 Ariz. 491, 503 (1985) (observing that the helplessness and senselessness means of proving heinousness and depravity "will ordinarily [not] be determinative on the question").

Here, the trial court correctly found that the murders were not especially cruel given the nature of the fatal injury—the fact that it was located in the back, it was the sole antemortem wound, the absence of defensive wounds, and the fact that it rapidly caused unconsciousness and death. [*See* RT 4/12/23, 15–25; EIR 926 (noting quickness of deaths)]. The court did, however, find that the offenses were heinous and depraved based on mutilation. [*See id*. (emphasizing body carvings)]; *State v. Vickers*, 129 Ariz. 506, 515 (1981) (finding depravity based on carvings).

Based on the way the state proved this aggravator, this Court should not give great weight to this factor. Although mutilation evinces the ill state of mind required for heinousness or depravity, as it evinces a disrespect shown to the victim's bodies, the fact remains that those acts were committed after the victims died. Thus, the torture and conscious suffering by a living person, i.e., cruelty, that rightfully justifies the great weight often accorded to the (F)(6) aggravator is simply absent here. It should therefore not be given great weight. *See also Jimenez*, 165 Ariz. at 455, 460 (finding leniency even though the defendant "needlessly mutilated the victim's body," "a helpless child who trusted him").

C. The (G)(5) age mitigator should be weighty, and the Court should also find that Bryan's moral culpability was low.

The trial court correctly found that, although the offenses involved planning and Bryan had average intelligence, Bryan's age of 20 at the time of the offenses should be relatively weighty. [EIR 926, 8, 25]. Indeed, as the court further found, Bryan's brain was not only still developing at this time, which would have affected his decision-making, but also "his experience up to the age of 20 was marked by his mother's abuse." [*Id*.].

This Court, however, should give even greater weight to this factor and find that Bryan had low moral culpability as a result. While the trial court found that Bryan was generally immature for his chronological age and declined to find that he had low moral culpability, it stopped there and failed to address the evidence Bryan

presented about his precise functional age at the time of the offense. [*Id*. at 8, 16 (merely acknowledging testimony that Bryan had "low functional maturity")].

Bryan presented expert testimony that—based on all the available information about Bryan and the reports of all observers of his life—he was functioning "in a range of like an 11, 12, 13-year-old" at the time of the offenses. [RT 2/7/23, 83–84]. And a functional age in this range, like chronological age in this range, should be entitled to great mitigating weight because it reduces moral culpability. *Cf.* *State v. Valencia*, 132 Ariz. 248, 251 (1982) (finding "the age of the defendant, 16 at the time of both crimes, is 'sufficiently substantial' to call for life imprisonment instead of death"); *Miller v. Alabama*, 567 U.S. 460, 472 (2012) ("Because the heart of the retribution rationale relates to an offender's blameworthiness, the case for retribution is not as strong with a minor as with an adult.").

Further, the age factor here bore a nexus to the offense. Indeed, Bryan presented expert testimony that functioning in the juvenile age range—as he was at the time of the offense—reduces a person's moral awareness. [RT 2/7/23, 84, 90–91]. And that nexus evidence is reinforced by the trial court's finding that Bryan's experience up to the age of 20 was marked by his mother's abuse. Thus, Bryan's capacity to appreciate wrongfulness was not only stunted due to his functional age at the time of the offense, but also what he knew about morality was skewed by his relatively young chronological age that had been marked by abuse up through the

time of the offenses—i.e., abuse was what he knew; it was normalized. This Court should therefore give strong weight to the statutory age mitigator and further find that Bryan had low moral culpability as a result.

D. The (G)(1) mitigating factor should have been found, and it should be given great weight.

Significant impairment under 13-703(G)(1) can be established if the defendant was in a dissociative state at the time of the offense. *See State v. Prince*, 226 Ariz. 516, 541 ¶ 108 (2011) (rejecting factor because no expert testified defendant entered dissociative state). The trial court here did not find that Bryan proved he was in a dissociative state at the time of the offenses or that the (G)(1) factor was proven. [EIR 926, 6–7].

In conducting its independent review, however, this Court should find *de novo* that the factor was proven based on the extensive evidence Bryan presented that he suffered from dissociative disorder at the time of the offense. [RT 1/17/23, 16–60 (qualifications in support of diagnosis), *id*. at 77; RT 1/18/23, 127–28 (no malingering agenda), *id*. at 180–82 (wiring of Bryan's brain); RT 1/24/23, 19–94 (complex dissociative disorder); RT 1/30/23, 83–123 (other specified dissociative disorder); RT 2/6/23, 14–17, 47–49, 62–68, 90, 144–66; RT 2/7/23, 15, 35–135; *id.* at 144 ("the hypothesis that accounts for this is a disassociated state of consciousness, not well accounted for by any social personality disorder"); RT 5/2/23, 85–124; *accord* RT 11/16/22, 108–10 (dissociated during examination); RT

12/13/22, 37–137; RT 12/14/22, 4–210 (extensive corroborative examples of disassociation during Bryan's life); RT 12/15/22, 18–105; RT 1/9/23, 5–133].

E. This Court should find that Bryan has autism.

Although the trial court found that the issue was close, it ultimately did not find that Bryan had autism spectrum disorder ("ASD"). [EIR 926, 7 ("The Court finds that the defendant may have high functioning Autism but the proof of that does not rise to the level of preponderance of the evidence.")]. This Court, however, in conducting a *de novo* review of this finding, should find that Bryan has ASD given the weight of the testimony presented.

Two experts affirmatively diagnosed Bryan with ASD—Dr. Weller and Dr. Cunningham, who diagnosed via interviews with Bryan using the DSM-5 criteria as well as by reviewing all available records throughout his life and the reports of, or interviews with, observers of his life. [RT 11/21/22, 9–17; RT 1/3/23, 44–52; RT 1/17/23, 57–58, 81–89]. Both conducted diagnostic evaluations because they observed signs of autism in other unrelated interviews with him. [RT 1/3/23, 43–44; RT 1/17/23, 57–58, 89]. Both Dr. Weller and Dr. Cunningham have prior experience diagnosing ASD. [RT 11/21/22, 9; RT 2/15/23, 32–33].

Two of the State's experts, Dr. Kohlhepp and Dr. Garby, did not observe signs of ASD in their unrelated interviews with Bryan and never specifically evaluated him for ASD. [RT 3/6/23, 79; RT 3/7/23, 24 (Kohlhepp admitting she didn't attempt

to elicit any signs or symptoms); RT 3/13/23, 92; RT 3/14/23, 113–14 (Garby admitting ASD is still a "possibility" though)]. And, in notable contrast to Dr. Weller and Dr. Cunningham, Dr. Garby admitted, "I'm not an expert in autism," [RT 3/14/23, 64], and Dr. Kohlhepp admitted that she typically does not diagnose ASD in her practice and instead refers the issue out to a "qualified psychologist to determine," [RT 3/6/23, 80; *see also id*. at 62–63].

The State's other expert, Dr. Seward, did not have the experience to rule out mild autism. [*See* RT 3/20/23, 6]. And the court-appointed expert, Dr. Dana-Kirby, in her supplemental report, acknowledged that Bryan "could" indeed have autism. [RT 2/28/23 PM, 51]. Cynthia Elliot, Bryan's former counselor at AYC, who has special education experience working with children with ASD, also believed, in retrospect, that Bryan could have high-functioning autism or Asperger's Syndrome. [RT 3/2/23, 78–79].

According to Dr. Weller, the State experts' disagreement with her diagnosis was a function of those experts spending less time with Bryan, the high co-morbidity between ASD and other disorders, and the difficulty of diagnosing ASD through testing, particularly the high-functioning end, in adults. [RT 11/21/22, 74–76; *see also* RT 1/24/23, 5 (Cunningham discussing DSM's identification of overlapping symptoms between anxiety disorder and ASD and how it can lead to difficulty in correctly diagnosing ASD)].

Notably, Dr. Kohlhepp acknowledged a co-morbidity between ASD and other mood disorders like anxiety disorder. [RT 3/6/23, 63]. But she appeared to discount ASD here because, beyond her not personally observing it, there was no diagnostic testing. [*See id*. at 80, 84]. Dr. Kohlhepp could not, however, say what sort of testing exists to diagnose autism. [RT 3/8/23, 206–07 ("That's beyond my area of expertise.")]. Dr. Garby claimed that the ADOS-2 was a test, adding, somewhat incredibly based on her admitted lack of expertise in ASD and failure to ever administer it, that it was the "gold star." [RT 3/14/23, 114–15 (adding there are other tests she cannot identify)]. But Dr. Weller, Dr. Cunningham, and, most tellingly, Dr. Dana-Kirby, all agreed that there is no good diagnostic testing for ASD in adults. [RT 2/15/23, 33–34; RT 2/28/23 PM, 46–47].

Ultimately, the balance of the evidence here establishes that Bryan proved he has ASD. Two qualified experts specifically diagnosed him using proper diagnostic criteria, two experts could not make a determination, one observer with relevant experience believed he may have a high-functioning version, and two experts disagreed, but they both admittedly lacked experience in the area, spent less time with Bryan, and could have missed the diagnosis based on their other findings, such as anxiety disorder, which is co-occurring. Under a *de novo* review, this Court should therefore find that Bryan proved this mitigating factor and accord weight to it

because the disorder, which is lifelong, can impact a person's ability to conform their conduct to the requirements of the law. [*See* RT 1/9/23, 32; RT 2/28/23 PM, 52].

F. Mental health issues, including sexual sadism disorder, should be entitled to more than little weight.

"Poor mental health that does not rise to the level of statutory mitigation under § 13-[703](G)(1) may nonetheless be a non-statutory mitigating factor." *State v. Prince*, 226 Ariz. 516, 542 ¶ 113 (2011). In considering what weight to give this mitigation, the Court considers *both* the mental health's "nexus to the crime" *and* the extent to which it impaired the defendant's "ability to conform or appreciate the wrongfulness of his conduct." *State v. Armstrong*, 218 Ariz. 451, 465 ¶ 77 (2008); *accord State v. Pandeli*, 215 Ariz. 514, 533 ¶ 81 (2007) ("Because Pandeli knew right from wrong, was not significantly impaired, *and* did not demonstrate a causal nexus between his mental impairments and the murder, we afford his mental health mitigation minimal weight." (emphasis added)).

Here, the trial court appeared to give the mental health evidence little weight *solely because* Bryan failed to prove the (G)(1) statutory mitigator, as if the failure to prove (G)(1) impairment means there is no nexus to the offense at all, rendering mental health evidence entitled to little weight as a matter of law:

> Mental health disorders are considered mitigating but may be accorded little weight without some connection to a defendant's offenses. This is discussed in the above analysis of significant impairment. Based on the mental health diagnoses the Court has found proven, the Court finds that this mitigating factor is entitled to little weight.

[EIR 926, 17 (citation omitted)]. But this analysis ignores that a nexus to the offense can still exist even where the impairment contemplated in (G)(1) does not.

For example, the trial court found that Bryan is a sexual sadist, [*Id*. at 7], which is a mental disorder that can be diagnosed through the DSM-5. [RT 3/14/23, 27]. Indeed, the State's expert diagnosed Bryan with sexual sadism disorder ("SSD"). [RT 3/13/23, 43–44]. The State's expert also agreed that "someone who is a sexual sadist [*would*] act out violently because of their sexual sadism," even though the disorder does not impair the ability to tell right from wrong. [RT 3/14/23, 13, 154–55 (emphasis added); *see also* RT 2/28/23, 25 (Dana-Kirby opining offenses sexually motivated)].

Thus, the uncontroverted evidence established that this mental disorder has a nexus to the offense—because someone diagnosed with it, like Bryan, *would* act out violently, as here, *because of it*—yet the disorder would not establish (G)(1) impairment. The trial court, however, ignored this evidence of nexus, which should have reasonably entitled the disorder to greater weight in mitigation. Accordingly, this Court should give greater weight to mental health issues.

G. Lack of future dangerousness should be weighty.

Lack of future dangerousness is a mitigating factor. *State v. Villalobos*, 225 Ariz. 74, 82 ¶ 34 (2010). Here, based on the State's concession, the trial court found that Bryan is not a future danger. [EIR 926, 20–21]. Although the trial court did not

specify the weight it was giving this factor, this Court should afford it significant weight in its independent review.

First, the State notably conceded this mitigation. Second, even under the State's theory for why Bryan committed the offenses—because he suffers from sexual sadism disorder, [*see* RT 4/6/23, 9–10]—Bryan will necessarily pose little future danger because the conditions for acting on that disorder will simply not be present in prison. Third, Bryan's post-offense life and incarceration provide decades of data showing that Bryan can act peacefully and socially integrate in a positive way.

H. The abuse Bryan suffered at the hands of his mother should be entitled to substantial weight.

"A difficult or traumatic childhood is a mitigating circumstance," and the weight to be accorded to this factor depends on both the "time [that] passes between the defendant's childhood and the offense" and "a causal nexus between the mitigating circumstance and the crime." *Prince*, 226 Ariz. at 541 ¶ 109.

Here, the trial court expressly found that "[a]ll the evidence leaves … a picture of a childhood marred by abuse and neglect," it implicitly found the time between the abuse and offense was minimal, and it gave the abuse factor among the "most weight" in its analysis. [EIR 926, 25*; see also id*. at 8 (finding "[Bryan's] experience up to the age of 20 [when the offense was committed] was marked by his mother's

abuse")]. But this Court should give this factor even greater weight—substantial weight—because Bryan also demonstrated a nexus between the abuse and offenses.

The trial court did not appear to find a nexus in addition to the minimal passage of time between the abusive childhood and offenses, as it appeared to reject the notion that Bryan's sexual sadism disorder was causally connected to the abuse because "the State's expert opined there is no research to support why or how a person becomes a sexual sadist." [*Id*. at 6]. This rejection was untenable.

First, Bryan presented extensive expert testimony about how Ellen's abuse, which had a sexual component, fused violence and eroticism in an adolescent Bryan. [*See, e.g.*, RT 1/19/23, 61–62 (Cunningham opining maltreatment by mothers can fuse violence and eroticism); *id*. at 63–134 (discussing foundation for opinion about the development of Bryan's sexuality—the abuse by Ellen documented and reported by various observers); *id*. at 134 (opining Ellen's abuse fused violence and eroticism); *see also* RT 1/23/23, 37; RT 1/24/23, 30–34 (discussing the relationship between offense and development of paraphilic disorder); RT 2/6/23, 31–32].

Further, the court-appointed expert, Dr. Dana-Kirby, also extensively opined that the abusive and sexually inappropriate environment led to the disorder. [*See* RT 3/16/23, 6–48]. And the State's sexual sadism expert largely agreed that much of Ellen's abuse and Bryan's exposure to violence and sex in the home could be traumatizing or psychologically impactful. [*See* RT 3/14/23, 14–33].

Second, the timeline of Bryan's life itself supports finding a nexus, as there is a clear correlation between Ellen's escalating physical and sexual-psychological abuse and Bryan's corresponding escalating behaviors that culminated in the offenses at issue here and then waned as he aged and became more independent of Ellen. That timeline alone establishes a reasonable inference of a nexus between the abuse and offense.

Third, Bryan presented studies that observed that a commonality between sexually violent offenders was abuse and neglect by their mothers. [*See* RT 3/14/23, 43–50]. For example, the "Burgess study," which interviewed sexual homicide offenders, found that "all of the participants either failed to bond with their primary care providers as children or developed selective and limited ways of bonding with others," which "helped contribute to the child's negative perception of reality, as well as their cognitive distortions concerning sexuality." [*Id*. at 46, 59].

The State's expert further acknowledged that "we know that there's correlations between early childhood issues with mothers in some individuals who grow up to have sexual aggression towards partners or women." [RT 3/14/23, 26 (Garby)]. She also acknowledged articles holding that paraphilic disorders, like sexual sadism, are "rooted in early childhood development." [*Id*. at 44–46 (acknowledging journal article citing studies "that offenders use paraphilia and fantasy in their conduct, precipitated by childhood trauma, triggering their sadistic

and/or behavior or serial killing")]. And she acknowledged that the DSM-5 linked distress with fluctuations in manifestations of the disorder. [*Id*. at 30].

But the expert still rejected the proposition that Bryan's childhood abuse by his mother could have led to his sexual sadism disorder and the offense because there were no recent studies "*definitively*" confirming such abuse "*causes*" sexual sadism. [*See id*. at 43 (emphasis added); *id*. at 26; *see also id*. at 45 (also dismissing studies presented by Bryan because they're "from over 25 years ago")].

Insisting upon unanimous scientific certainty to demonstrate a cognizable nexus for mitigation purposes, however, is neither required by law nor reasonable based on the evidence in this case. It effectively demands the impractical, if not impossible. Indeed, the field of psychology simply doesn't appear to be attempting the type of definitive research the State's expert insists is necessary. [*See* RT 3/14/23, 26 (Garby admitting there's "[n]ot a lot of research on sexual sadists")]. And, as the expert further acknowledged, there seems to be a practical reason for this—"lots of sexual sadists are never treated and they don't end up in research things because [the] majority of the population that engages in sexual sadistic behaviors are not known to people." [*Id*. at 54–55].

Moreover, the State's expert was incredible in insisting that definitive research was necessary to find a causal connection between abuse and violent sex acts because she purported to be able to determine what *did not cause* his sexual

sadism disorder. [RT 3/13/23, 129; *see also* RT 3/14/23, 32 (opining trauma would not have caused sadistic part of Bryan's sex life with Amy)].

In view of the evidence in this case, this Court should (1) find that Bryan demonstrated a sufficient legal nexus between his childhood abuse and the violent, sexually motivated offenses here, (2) reject the untenable proposition that such a nexus cannot exist merely because scientific research has not *definitively* proven that traumatic abuse is the exclusive *cause* of violent sex acts or sexual sadism disorder, and (3) give substantial weight to the abuse Bryan suffered as a child in mitigation during its independent review. *See Bocharski*, 218 Ariz. at 499 ¶¶ 111–12 (finding leniency where single expert provided nexus between childhood abuse and offense).

The Court should also find the one instance of abuse that the trial court did not—that Ellen showed Bryan violent pornography, specifically Faces of Death and Shocking Asia. [EIR 926, 24–25]. The Court appeared to not find this fact because it was not independently corroborated. [*See id*.]. But it was.

First, it was undisputed that police found these films on VHS tapes in boxes in Bryan's home that were marked as belonging to Ellen. [RT 10/10/22, 94–95; RT 01/17/23, 60–61; *see also* RT 1/23/23, 131 (Ellen's things went to Bryan after she died)]. Second, third-party evidence established that Ellen showed Bryan violent videos, possessed sexually inappropriate materials in the home, and engaged in sexually inappropriate activities. [RT 05/02/23, 67–69 (Cunningham recounting

how neighbor in Hawaii reported that Ellen told her Bryan was a "wuss" because he vomited "in response to seeing video of automobile accidents and decapitation"); RT 11/9/22, 58; RT 11/14/22, 126–28; *see also* EIR 926, 21–22 (finding proven early exposure to pornography, violent films, and graphic material)].

Ultimately, this evidence establishes strong corroborative inferences that Ellen did show Bryan these films, and the trial court's failure to find this fact is otherwise unreasonable in light of its other findings, reported by Bryan and corroborated, about what Ellen did. This Court should find the fact.

I. Bryan's life post-offense should be entitled to substantial weight.

Lack of a felony criminal record, educational achievement (including GED), a productive life, being a good family member, and positive relationships can all be mitigating. *See Greene*, 192 Ariz. at 442–43 ¶¶ 52–57; *see also State v. Poyson*, 198 Ariz. 70, 82 (2000) (family support can be mitigating); *State v. Williams*, 183 Ariz. 368, 383–85 (1995) (good conduct and character and strong family relationships may be mitigating).

Here, the trial court correctly found several mitigating factors related to Bryan's life after the offenses—his positive parenting, positive involvement in subcultures, positive work history, lasting friendships, current family support, artistic abilities, obtaining his GED, lack of substance abuse, lack of criminal history

after Washington, and positive life progress. [EIR 926, 10, 17, 19–21]. But the court gave these factors individually either little weight or no specified weight. [*Id*.].

This Court, however, should give these factors, collectively, substantial weight in its independent review because they all speak to Bryan's character and, more importantly, Bryan's capacity for change—his change from an introverted, abused teenager who increasingly began acting out, culminating in the present offenses in early adulthood, to a man who could productively contribute, manage his life, and positively interact and form relationships with others.

In *Miller*, the Supreme Court observed that one of the defining features of juveniles is their capacity for change. 567 U.S. 460, 471, 472, 479. And it was that feature, the Court found, that was at odds with foreswearing the rehabilitative ideal and mandatorily imposing a sentence that, to a juvenile, is tantamount to death. *Id*. at 473 ("Life without parole forswears altogether the rehabilitative ideal. It reflects an irrevocable judgment about an offender's value and place in society, at odds with a child's capacity for change."); *id*. at 470 ("*Graham* further likened life without parole for juveniles to the death penalty itself").

Considering that the capacity for change inherent in youth is a reason to bar the mandatory imposition of an effective death sentence, Bryan's demonstrated, individual capacity for change, evinced through the trial court's collective findings about his positive life progress post-offense, should substantially weigh against

imposing the death sentence here. *See also Villalobos*, 225 Ariz. at 82 ¶ 34 (potential for rehabilitation mitigating). Indeed, these factors, even on their own, very much weigh in favor of life.

For instance, that Bryan could be an overall productive member of society and advance his education is a reason for life. That he didn't turn to substances or further crime despite his past is a reason for life. That he found a way to channel his interests in a positive direction through art, crafting, and roleplay is reason for life. That he could still connect to others and form meaningful and lasting relationships is reason for life. That he still has family support is reason for life. And that he broke the cycle of abuse he experienced as a child by caring for and simply loving—*loving*—his daughter is reason for life.

But viewed collectively, these factors evince something even more powerful—Bryan's capacity for change, a mitigating factor that this Court should recognize and give substantial weight to in its independent review.

ARGUMENT 9

Issues Preserved for Federal Review

Bryan Miller raises the following issues for preservation. This Court has previously rejected each claim.

1. The death penalty is cruel and unusual under any circumstances and violates U.S. Const. Amend. 8 & 14, and Ariz. Const. Art. 2, § 15. *Contra Gregg v. Georgia*, 428 U.S. 153, 186–87 (1976).

2. The death penalty is imposed arbitrarily and irrationally, in violation of U.S. Const. Amend. 8 & 14, and Ariz. Const. Art. 2, §§ 4 & 15. *Contra State v. Beaty*, 158 Ariz. 232, 246–48 (1988); *State v. Pandeli*, 200 Ariz. 365, ¶ 87 (2001), *vacated on other grounds by Pandeli v. Arizona*, 536 U.S. 953 (2002).

3. There is no meaningful distinction between capital and noncapital murder cases, making each crime the product of an unconstitutionally vague statute. *Contra State v. Hidalgo*, 241 Ariz. 543 (2017); *State v. Salazar*, 173 Ariz. 399, 411 (1992).

4. Arizona's death penalty is applied so as to discriminate against poor, young, and male defendants in violation of Ariz. Const. Art. 2, §§ 4, 13. *Contra State v. Stokley*, 182 Ariz. 505, 516 (1995).

5. The death penalty is the irreversible denial of international human. The Eighth Amendment "draw[s] its meaning from evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). The international community of nations has evolved to a state of maturity that abolishes the death penalty. The Universal Declaration of Human Rights, GA Res. 217A (III), U.N. GAOR, 3d Sess. Art. 3, U.N. Doc. A/810 (1948) provides that "Everyone has the right to life, liberty, and security of person." *Contra State v. Ross*, 180 Ariz. 598, 602 (1994).

6. The prosecutor's discretion to seek the death penalty has no standards and therefore violates U.S. Const. Amend. 8 & 14, and Ariz. Const. Art. 2, §§ 1, 4, 15. *Contra State v. Salazar*, 173 Ariz. 399, 411 (1992).

7. Arizona's death penalty scheme is unconstitutional because it does not require the sentencer to find beyond a reasonable doubt that the aggravating circumstances outweigh the accumulated mitigating circumstances, violating U.S. Const. Amend. 5, 6, 8, 14, and Ariz. Const. Art. 2, §§ 4, 15. *Contra State v. Roque*, 213 Ariz. 193, ¶¶ 138–141 (2006); *State v. Poyson*, 198 Ariz. 70, ¶ 59 (2000).

8. To whatever extent that this Court may conduct any independent review with a review standard weaker than *de novo*, this would fail to afford meaningful independent review and fail to genuinely narrow the circumstances in which death over life could be imposed. *Contra State v. Cota*, 229 Ariz. 136, ¶¶ 91–92 (2012).

9. The absence of proportionality review of death sentences by Arizona courts denies capital defendants due process of law and equal protection and amounts to cruel and unusual punishment in violation of U.S. Const. Amend. 5, 8, 14, and Ariz. Const. Art. 2, § 15. *Contra State v. Salazar*, 173 Ariz. 399, 416 (1992).

10. The especially cruel, heinous, and depraved aggravating circumstance is facially vague and vague as applied in violation of U.S. Const. Amend. 8, 14. *Contra State v. Hampton*, 213 Ariz. 167, ¶¶ 35–36 (2006).

11. Arizona's capital sentencing scheme is unconstitutional because it does not require that the State prove that the death penalty is appropriate, violating U.S. Const. Amend. 5, 8, 14, and Ariz. Const. Art. 2, § 15. *Contra State v. Ring*, 200 Ariz. 267, ¶ 64 (2001), *rev'd on other grounds Ring v. Arizona*, 536 U.S. 584 (2002); *State v. Gulbrandson*, 184 Ariz. 46, 72 (1995); *State v. Dann*, 220 Ariz. 351 (2009).

12. Arizona's capital scheme provides no objective standards to guide the sentencer in weighing the aggravating and mitigating circumstances, violating U.S. Const. Amend. 8, 14, and Ariz. Const. Art. 2, § 15. *Contra State v. Pandeli*, 200 Ariz. 365, 382 (2001), *vacated on other grounds by Pandeli v. Arizona*, 536 U.S. 953 (2002).

13. Arizona's death penalty law unconstitutionally fails to require the cumulative consideration of multiple mitigating factors or require that the

jury make specific findings as to each mitigating factor. *Contra State v. Gulbrandson*, 184 Ariz. 46, 69–71 (1995).

14. Arizona's death statute creates an unconstitutional presumption of death and places an unconstitutional burden on defendants to prove mitigation is sufficiently substantial to call for leniency. *Contra State v. Glassel*, 211 Ariz. 33, ¶¶ 66–68 (2005).

15. A.R.S. § 13-751 does not sufficiently channel the sentencer's discretion. Aggravating circumstances should narrow the class of persons eligible for the death penalty and reasonably justify the imposition of a harsher penalty. The broad scope of Arizona's aggravating factors encompasses nearly anyone involved in a murder, violating U.S. Const. Amend. 8, 14, and Ariz. Const. Art. 2, § 15. *Contra State v. Bocharski*, 218 Ariz. 476, ¶ 49 (2008).

16. Victim impact evidence admitted at the penalty phase of the trial violates U.S. Const. Amend. 5, 6, 8, 14, and Ariz. Const. Art. 2, §§ 1, 4, 13, 15, 23, 24. *Contra Lynn v. Reinstein*, 205 Ariz. 186, 191 (2003); *State ex rel. Thomas v. Foreman*, 211 Ariz. 153, 157–58 (App. 2005).

17. The factfinder in capital cases must be able to consider all relevant mitigating evidence in deciding whether to give the death penalty. *See Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). The failure to allow this jury to consider and give effect to all mitigating evidence in this case by limiting its consideration to that proven by a preponderance of the evidence violates U.S. Const. Amend. 8, 14. *Contra State v. McGill*, 213 Ariz. 147, ¶ 59 (2006).

18. As it stands in Arizona, execution by lethal injection is cruel and unusual punishment under U.S. Const. Amend. 8, 14, and Ariz. Const. Art. 2, § 15. *Contra State v. Van Adams*, 194 Ariz. 408, ¶ 55 (1999); *Baze v. Rees*, 553 U.S. 35 (2008).

19. The Arizona capital sentencing scheme is facially unconstitutional because the aggravation stage does not meaningfully narrow the eligibility for capital punishment. *Contra State v. Hidalgo*, 241 Ariz. 543, ¶¶ 14–29 (2017).

CONCLUSION

For the reasons set forth above, this Court should reverse the convictions and order a new trial, or alternatively reduce Bryan's sentence to natural life.

RESPECTFULLY SUBMITTED this 24th day of February, 2025

By /s/
Aaron J. Moskowitz
Deputy Maricopa County Public Defender

By /s/
Scott L. Boncoskey
Deputy Legal Defender